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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1160

TRANSPORT OF NEW JERSEY,
a corporation of New Jersey,

Petitioner,

vs.

DELAWARE RIVER PORT AUTHORITY, a body corporate and politic created by compact between the State of New Jersey and the Commonwealth of Pennsylvania,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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Citations to Opinions Below

The opinions of the Federal Highway Administrator are printed in Appendix B hereto, infra, pp. 2a to 9a. The

oral opinion of the Court of original jurisdiction is unreported and is printed in Appendix B, infra, pp. 10a to 18a. The opinion of the New Jersey Superior Court, Appellate Division, printed in Appendix B, infra, pp. 21a to 31a, is reported in 114 N. J. Super. 331, 276 A2d 382 (1971). The grant of certification by the New Jersey Supreme Court, printed in Appendix B, infra, p. 32a, is reported in 58 N. J. 595, 279 A2d 680 (1971). The opinion of the New Jersey Supreme Court, printed in Appendix B, infra, pp. 33a to 35a, is reported in 59 N. J. 531 (1971).

Jurisdiction

The opinion of the New Jersey Supreme Court was rendered on December 13, 1971 and is printed in Appendix B, infra, pp. 32a to 34a. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3). As the facts were not in dispute, the question presented to this Court was first raised by cross motions for summary judgment (Appendix B, infra, pp. 10a). The question here presented was specifically ruled on in the Superior Court, Law Division, in favor of the defendant and that opinion is printed in Appendix B, infra, pp. 10a to 18a. The question was again ruled on in favor of the defendant by the New Jersey Superior Court, Appellate Division, printed in Appendix B, infra, pp. 21a to 31a, which decision is reported in 114 N. J. Super. 331, 276 A2d 382 (1971). The judgment of the Superior Court, Appellate Division, was affirmed by the New Jersey Supreme Court solely on the question here presented as stated in its opinion printed in Appendix B, infra, pp. 33a to 35a which decision is reported in 59 N. J. 531 (1971).

Question Presented

Whether the General Bridge Act of 1946, as amended, (33 U.S.C. § 526) extinguished the right of a motor carrier of passengers for hire to bring a common law action for reparations against a bistate authority which authority had increased its bus toll rate by 50% after a determination by the Federal Highway Administrator that the increased bus toll rate charged by the authority for travel over its bridges would be reasonable and just if said rate was reduced by 25%.

Statute Involved

The statutory provision involved is Section 503 of the General Bridge Act of 1946, as amended, (33 U.S.C. §526) and is printed in Appendix A, infra, p. 1a.

Statement

The salient facts are not in dispute and are set forth at length in the oral opinion of the New Jersey Superior Court, Law Division, printed in Appendix B, infra, pp. 10a to 18a and in the opinion of the New Jersey Superior Court, Appellate Division, printed in Appendix B, infra, pp. 21a to 31a which decision is reported in 114 N. J. Super. 331, 276 A2d 382 (1971).

Defendant Port Authority was authorized to own and operate the Benjamin Franklin and Walt Whitman Bridges which span the Delaware River between New Jersey and Pennsylvania. Transport of New Jersey, the plaintiff and petitioner herein, formerly Public Service Coordinated Transport, is a common carrier of passengers for hire and maintains interstate passenger service between Pennsyl-

vania and New Jersey which service utilizes defendant's bridges. In January of 1968, defendant announced its intention to raise various toll rates effective February 1, 1968 over its bridges in order to support construction of new bridges and other operations. The bus toll rate was to be increased from fifty cents to one dollar per crossing. Plaintiff and others filed objections to the proposed rate increases with the Federal Highway Administrator, the successor to the authority previously exercised by the Secretary of the Army as set forth in Section 503 of the General Bridge Act (Appendix B, infra, pp. 2a to 7a, 10a to 11a, 23a to 24a).

After an administrative hearing at which plaintiff and others participated, the hearing examiner determined that the increased bus toll rate should be reduced and recommended a ten per cent reduction. Exceptions to the hearing examiner's report and recommended order were duly filed with the Federal Highway Administrator who thereafter filed his opinion on September 11, 1968 (Appendix B, infra, pp. 2a to 7a). The Federal Highway Administrator found the hearing examiner's toll structure to be just and reasonable except for the increased toll rate pertaining to buses which he directed should be reduced from one dollar to seventy-five cents. Defendant did not seek administrative or judicial review of the Administrator's ruling but complied by reducing the bus toll rate from one dollar to seventy-five cents effective October 1, 1968 (Appendix B, infra, pp. 25a to 26a).

Plaintiff brought an action at law in the New Jersey Superior Court, Law Division, to recover the difference between the one dollar per trip paid from February 1, 1968 to October 1, 1968 and the seventy-five cent per trip rate found to be reasonable by the Administrator and fixed by the defendant as the bus toll rate for its bridges as of

October 1, 1968. The parties agreed that the sum sought to be recovered was $116,281 representing 465,125 crossings at the dollar rate. Since the essential facts were admitted, cross motions for summary judgment were argued before the New Jersey Superior Court, Law Division (Appendix B, infra, pp. 10a to 13a).

The New Jersey Superior Court, Law Division, found (a) that the Federal Highway Administrator has only the right to prescribe rates prospectively and is without authority to make a determination as to the reasonableness of past rates (b) that the Administrator's determination that the bus tolls should be reduced from one dollar to seventy-five cents was not a determination that the dollar toll was unreasonable and (c) that the General Bridge Act failed to provide a remedy for reparations and therefore it was not the intent of Congress to allow reparations in the event of a reduction in bus toll rates (Appendix B, infra, pp. 10a to 18a).

In affirming the judgment of the Law Division, the New Jersey Superior Court, Appellate Division, held that the reasonableness of bridge tolls is not a matter for judicial decision but has been exclusively preempted by legislation imposing that responsibility by virtue of the General Bridge Act upon the proper administrative authority and, therefore, the common law right to reparations was extinguished (reported in 111 N. J. Super. 331, 276 A2d 382 (1971) and printed in Appendix B, infra, pp. 21a to 31a).

After granting plaintiff's Petition for Certification (reported in 58 N. J. 595, 279 A2d 680 (1971) and printed in Appendix B, infra, pp. 32a), the New Jersey Supreme Court on December 13, 1971 affirmed the judgment of the Appellate Division on the basis of the majority opinion in *T.I.M.E., Inc.* v. *United States*, 359 U. S. 464, 79 S. Ct.

901, 3 L. ed. 2d 952 (1959) but the New Jersey Supreme Court also held that the Federal Highway Administrator's determination that a bus toll rate of seventy-five cents was reasonable must be considered a finding that any amount above seventyfive cents is unreasonable and concluded its opinion by disagreeing with that part of the Appellate Division's decision which indicated the result was a just one (printed in Appendix B, infra, pp. 33a to 35a and reported in 59 N. J. 531 (1971).

Reasons for Granting the Writ

1. The Supreme Court of New Jersey in interpreting the General Bridge Act held that the common law action for reparations brought by the plaintiff was barred by the majority opinion in *T.I.M.E., Inc.* v. *United States*, 359 U. S. 464, 79 S. Ct. 901, 3 L. ed. 952 (1959) which opinion is printed in Appendix B, infra, pp. 48a to 83a. Plaintiff contends that such determination is in direct conflict with the decision in the *T.I.M.E.* case, supra, and with the decisions of the United States Supreme Court in *Hewitt-Robins, Inc.* v. *The Eastern Freightways, Inc.*, 371 U. S. 84, 83 S. Ct. 157, 9 L. Ed. 2d 142 (1962); *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U. S. 246, 71 S. Ct. 692, 95 L. Ed. 912 (1951) and *Texas and Pacific Railway Company* v. *Abilene Cotton Oil Company*, 204 U. S. 426, 27 S. Ct. 350, 51 L. Ed. 533 (1907). (The last three cited cases are printed in Appendix B, infra, pp. 37a to 47a, pp. 84a to 107a and pp. 107a to 135a).

2. Plaintiff further contends that the question herein presented is of novel impression, national in scope and directly affecting interstate commerce. As such, it should be settled by the United States Supreme Court.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted.

WILLIAM S. SMITH,
Counsel for Petitioner,
Transport of New Jersey.

[APPENDICES FOLLOW]

APPENDIX A

Statutes Involved

Section 503 of the General Bridge Act of 1946, as amended (33 U.S.C. § 526), which reads as follows:

"Amount of tolls

"If tolls shall be charged for the transit over any interstate bridge of engines, cars, street cars, wagons, carriages, vehicles, animals, foot passengers, or other passengers, such tolls shall be reasonable and just, and the Secretary of the Army may, at any time, and from time to time, prescribe the reasonable rates of toll for such transit over such bridge, and the rates so prescribed shall be the legal rates and shall be the rates demanded and received for such transit. Aug. 2, 1946, c. 753, Title V, § 503, 60 Stat. 847."

APPENDIX B

Decisions, Opinions and Judgments Below

OPINION OF THE ADMINISTRATOR RE: IN THE MATTER OF THE WALT WHITMAN AND BENJAMIN FRANKLIN BRIDGE TOLLS

U. S. DEPARTMENT OF TRANSPORTATION
FEDERAL HIGHWAY ADMINISTRATION

Effective February 1, 1968, the Delaware River Port Authority (hereinafter DRPA) increased the toll charges on the Walt Whitman and Benjamin Franklin bridges which span the Delaware River between Philadelphia, Pennsylvania and Camden, New Jersey. Cash tolls for automobiles and light trucks (7,000 pounds and under) were increased from 25 cents to 50 cents and the cost of a commutation ticket for such vehicles rose from 18.75 cents to 25 cents;[1] bus tolls were increased from 50 cents to $1.00; and truck tolls were increased from a range of 50 cents to $2.00, based on weight, to from $1.00 to $3.00 depending on the number of axles on the vehicle. By order dated May 29, 1968, the Administrator directed that a hearing be held in Philadelphia, Pennsylvania for the purpose of allowing interested parties to submit evidence relating to the question of the reasonableness and justness of the new tolls. The hearing, held in Philadelphia before Hearing Examiner Robert R.

[1] These commutation tickets are sold in books of 40 and are good for two months. Operators of automobiles and light trucks may also purchase a 20-trip book of tickets, valid for three months, at a cost of 35 cents apiece. The commutation books are transferable among operators of automobiles.

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Boyd, began on June 26, 1968 lasted five days and covers a record of 1150 pages and 92 exhibits. On August 1, 1968, the hearing examiner issued a recommended decision recommending that the DRPA be directed to revise its tolls for passenger buses and trucks over 7,000 pounds gross weight so as to provide a 10 percent scrip discount to operators of those vehicles. Exceptions to the recommended decision were filed by the DRPA, the Federal Highway Administrator's staff, who participated in the proceedings in the public interest, and Public Service Coordinated Transport, a bus operator.

After reviewing the record and considering the questions raised by the excepting parties, I have concluded that the examiner's recommended toll structure with the exception noted below is just and reasonable and am adopting the findings of fact he has made. However, for reasons set forth below I find that the record warrants a greater reduction in bus tolls than recommended to me and find that such tolls should be reduced by 25 percent, from $1.00 to 75 cents per crossing.

As previously noted, the DRPA raised the bus toll rate from 50 cents to $1.00, an increase of 100 percent. The evidence establishes that such an increase will have a substantial impact on the bus companies whose vehicles regularly use the Walt Whitman and Ben Franklin bridges. For example, it was shown that if the present bus toll had been in effect in 1967, the net income of the largest bus operator using these bridges would have been reduced by some 62 percent; smaller bus companies would have suffered similar effects. The evidence also establishes that the bus toll rate increase adopted by DRPA is likely to be passed onto passengers either

through increased fares or reduced service. It is obviously in the public interest to adopt a toll structure which would minimize such consequences. Finally, the record shows that the present bus toll rate is higher than that charged by most other bridge authorities.

The examiner noted that in many areas a 75 cent bus toll prevails and found that such a rate for the DRPA bridges would be within the zone of reasonableness. Nevertheless, he viewed a 10 percent scrip discount reduction as more appropriate here apparently because such a reduction would make the DRPA bus toll comparable to that charged by the New York Port Authority. The comparability factor although significant is only one of many relevant considerations. In view of the finding that a 75 cent toll rate for buses is within the zone of reasonableness it is in the public interest that such rate be adopted unless some obstacle more compelling than non-comparability exists.

On this record the basic issue is whether a 25 percent reduction for bus tolls combined with the 10 percent scrip discount for trucks over 7,000 pounds gross weight recommended by the examiner would so decrease aggregate toll revenues as to impair the Port Authority's ability to finance its planned capital construction program. The examiner found in this regard that a 10 percent scrip discount for buses and trucks over 7,000 pounds would have no such effect. I find that reducing the bus toll rate even further—to 75 percent of the present rate—is also permissible.

The record shows that a 25 percent reduction in bus tolls would reduce DRPA gross revenues by some $166,500 in the key year of 1972, the first year all of the new

facilities are scheduled to be in operation. To this figure should be added the loss in revenue attributable to the 10 percent scrip discount for trucks. There was evidence that a flat 10 percent discount for trucks would result in a reduction in revenues of some $695,000 in 1972. Only 50 percent of the trucks of all sizes using DRPA bridges are regular users who could be expected to purchase scrip; the remainder are relatively irregular users for whom scrip purchases might be neither convenient nor sufficiently attractive financially. Light trucks conducting predominantly local operations probably comprise the major number of regular users. The scrip discount for trucks considered here, however, is only to be applicable to truckers operating heavy vehicles weighing in excess of 7,000 pounds. In these circumstances it is not unreasonable to infer that the 10 percent scrip discount for truckers would reduce revenues only 50 percent of a flat 10 percent discount or some $350,000. Moreover, that figure does not reflect any allowance for the value of the use of sums deposited with the Authority in payment for scrip. Consequently I find that a combined 25 percent bus toll reduction and 10 percent scrip discount for trucks would result in no more than some $510,000 loss in gross revenues to the Port Authority in the key year of 1972.

There was expert testimony that the marketing of a bond issue of the size contemplated by the Port Authority requires a coverage ratio of befewen 1.35 and 1.40. However, under its present toll schedule, assuming an issue of $322,500,000, the coverage ratio drops to about 1.30, a figure below the minimum supported by record testimony. Under the Authority's current plan, some $25,000,000 in Authority funds presently are uncommitted surplus. It

was acknowledged, moreover, that the surplus would grow to about $30,000,000 by 1969 and substantially more by 1972. The Authority's financial consultant conceded that the Authority could and, if necessary, would draw upon its uncommitted surplus to make whatever adjustments in the financing plan were required to raise the coverage ratio to an acceptable level.

Assuming continuance of the Authority's present toll structure use of some $15,000,000 of uncommitted surplus would be required to secure a coverage ratio of 1.35. The Authority can draw this amount from its surplus if necessary to produce a marketable bond issue. A 25 percent reduction in bus tolls and 10 percent scrip discount for trucks would require the use of an additional $4,000,000 of the Authority's surplus to secure the same 1.35 coverage ratio. No specific pressing commitments or needs of the Authority appear from the record that would preclude such action from being taken. Moreover, as indicated the Authority's surplus will increase substantially during the next few years. There is no basis in the record to conclude that if $19,000,000 is committed to the financing plan the surplus remaining would be inadequate for the presently foreseeable needs of the Authority. Accordingly, I find that if the commitment of such sum is necessary to market the issue that the Authority has the present capability of doing so.

Finally, a prominent investment banker gave his expert opinion that a $230,000 reduction in revenues from the present schedule in the framework of an overall financing plan calling for more than $39,000,000 in gross revenues could be accumulated without impairing effectuation of the plan. A representative of the Authority gave

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as his opinion that a $750,000 loss in revenue would adversely affect the financing program. In light of the availability of present and future surplus, and the flexibility which inheres in any financing program of this magnitude, I conclude that the necessary adjustments can be made to accommodate a reduction of some $510,000 in toll revenues which will result from the revised toll rates I am directing the Authority to adopt.

I find that if the present toll schedule is revised so as to (1) reduce the present bus toll rate by 25 percent, and (2) provide a 10 percent scrip discount for trucks over 7,000 pounds gross weight as recommended by the examiner, that the resulting toll schedule is reasonable and just. Unless the DRPA toll schedule is so revised within 20 days from the date of this opinion the Administrator will issue an order prescribing such rates as the legal rates to be charged by the Authority.

Petitions for reconsideration may be filed with the Federal Highway Administrator within 10 days after the issuance of this opinion.

Issued in Washington, D. C., on September 11, 1968.

LOWELL K. BRIDWELL
Federal Highway Administrator

Appendix B

OPINION AND ORDER OF THE ADMINISTRATOR

(Filed—May 12, 1970)

U. S. DEPARTMENT OF TRANSPORTATION
FEDERAL HIGHWAY ADMINISTRATION

In the Matter of the Walt Whitman and Benjamin Franklin Bridge Tolls

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The City of Philadelphia has petitioned for reconsideration of the opinion of September 11, 1968 setting forth certain findings regarding the toll schedules of the Delaware River Port Authority (DRPA) which were then in effect. On September 18, 1968, the Board of Commissioners of the DRPA adopted a resolution, effective October 1, 1968, revising its toll schedule in accordance with the Administrator's opinion.

The City's points lack merit. First, there is uncontradicted expert testimony in the record to the effect that the reduction in automobile and truck tolls proposed by the City would reduce revenues to a point where the DRPA could not go forward with its planned construction program. Moreover, the "substantial evidence" which the City cites in support of its position is a seven-year old traffic study which used a method of predicting traffic totally unacceptable to the municipal bonding houses. Second, the Administrator did not conclude in his opin-

ion that the complainants had the burden of proof in this case. There was no need to pass on this issue since the record was such that the Administrator's findings would have been the same regardless of where the burden of proof rested. Third, the Administrator did conclude that the Port Authority had made a prima facie showing that its toll schedule was reasonable. Although the opinion did not specifically so state, that conclusion is implicit. Fourth, applying the zone-of-reasonableness test in this case did not mean—notwithstanding the City's contention to the contrary—that in order to rule for the complainants it was necessary to find that the Port Authority had committed a tort in charging the tolls which it did. The City's position on this point is contrary to that urged by it on brief to the hearing examiner. Finally, under the statute the DRPA toll structure can be reexamined at any future time it is deemed appropriate to do so. There was therefore no need, as suggested by the City, to order the FHWA staff to reexamine the DRPA toll schedule at some future, undetermined date.

The City's points have been considered on the merits even though it did not file exceptions to the examiner's recommended decision. The City had ample opportunity to raise the points at that time and should have done so.

For the Reasons set forth above, I conclude that the petition for reconsideration should be denied.

Accordingly, It Is Ordered that (a) the petition for reconsideration filed by the City of Philadelphia is hereby denied and (b) the proceedings in this case are hereby terminated.

Issued in Washington, D. C., on December 11, 1968.

Lowell K. Bridwell
Federal Highway Administrator

Appendix B

DECISION OF SUPERIOR COURT—LAW DIVISION (COURT OF INITIAL JURISDICTION) ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION—CAMDEN COUNTY

CIVIL ACTION

PUBLIC SERVICE COORDINATED TRANSPORT,
a corporation of New Jersey,

Plaintiff,

v.

DELAWARE RIVER PORT AUTHORITY, a body corporate and politic created by compact between the State of New Jersey and the Commonwealth of Pennsylvania,

Defendant.

The Court: This matter comes before me in cross motions for summary judgment; and the facts giving rise to this controversy are not in dispute.

The actions submitted by the Plaintiff, is to recover bridge toll charges collected by the Defendant, Port Authority, and alleged by the Plaintiff to be excessive. Plaintiff is the operator of an interstate bus transporta

tion business between New Jersey and Pennsylvania and uses bridges operated by Defendant, Port Authority, namely the Walt Whitman Bridge and the Ben Franklin Bridge. The Port Authority is an Interstate Agency created by joint-contract against the State of New Jersey and Pennsylvania, which was also approved by acts of Congress.

In 1968 its primary business was the operation of the two bridges, thus referred to. About 1968, the Port Authority undertook by virtue of direction of the Pennsylvania and New Jersey Legislature, the development, construction and the operation of a high-speed transportation system between Philadelphia and Lindenwold, New Jersey. And in order to finance the construction of this high-speed line primarily and other facilities, incidently, the Defendant, Port Authority, increased the tolls on the existing bridges. Passenger tolls were raised from twenty-five cents to fifty cents, and bus tolls were raised from fifty cents to one dollar; other tolls including truck tolls were also increased. The proposed increase of tolls was announced to become effective February 1, 1968 and Plaintiff protested the proposed increase as far as its operation was concerned.

Pursuant to Plaintiff's protest, as well as other protests to the Federal Highway Administrator, now the Agent appointed by Act of Congress to regulate the tolls on interstate bridges, the matter was referred to a hearing Examiner, testimony and argument was held before him and the Examiner recommended that the toll schedule promulgated by the Port Authority be approved with the single exception that he recommended a reduction in the bus tolls from one dollar to ninety cents.

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Exceptions to the Examiner's report were filed and the matter came from the Federal Highway Administrator who published an opinion dated September 11th, 1968 determining or recommending that the Defendant, Port Authority, reduce its present bus toll rate by twenty-five per cent and to further provide a ten per cent discount for trucks which latter item is not of any concern to us at this time.

The opinion of the Administrator indicated that unless the Defendant, Port Authority's toll schedule was so revised in accordance with his recommendations within twenty days from the date of the opinion he would issue an order prescribing such rates. Port Authority accepted the Highway Administrator's suggestion and the toll schedule was reduced; accordingly, no final order was ever entered by the Highway Administrator, but I don't think that is of any importance at this time.

The present suit is to recover the difference in dollars paid by the Plaintiff in the course of the operation of its buses over the two bridges referred to from February 1, 1968, until tolls were reduced, pursuant to the Administrator's order of September 11th, 1968.

The theory of the Plaintiff's suit is when the Administrator determined that the seventy-five-cent toll rate was reasonable and just this impliedly meant and determined that the toll rate originally quoted by the Defendant, Port Authority, was unreasonable or unjust and therefore they are entitled to recover the difference in this common-law or action at law.

This action to recover the money is referred to as obtaining reparations. The Defendant's motion is followed on the fact that there was no determination, that it was

that the original toll schedule was not reasonable or just; and the determination by the Administrator only acted perspectively and not retroactively and did not consider that past tolls charged were unreasonable or unjust.

Therefore, there is no basis for the recovery; in addition to that, it is claimed that there is no authority in the statute regulating interstate bridges for operations. I conclude that when the Federal Highway Administrator, by his opinion, determined that the toll rate should be reduced by twenty-five per cent or seventy-five cents that this in itself, was not a determination that the past tolls or toll schedule was unreasonable and unjust. Not only is that determination absense from his opinion, but I would seriously doubt if he ever had the statutory authority or any other authority to make such a determination.

His authority to act in this matter is prescribed by Section 503 of the General Bridge Act of 1946, which can be found in 3USC526. That Section of the statute provides as tolls quote, "if tolls shall be charged for the transit over any interstate bridge of engine cars, street cars, wagons, carriages, vehicles, or foot passengers, or other passengers, such tolls shall be reasonable and just; and the Secretary of the Army may at anytime and from time to time prescribe the reasonable rates of toll for such transit over such bridge, and the rates so prescribed shall be the legal rates and shall be the rates demanded and received for such transit," unquote.

The power vested in the original Act to the Secretary of the Army was changed from time to time and is now lodged in the Federal Highway Administrator. The plain

reading of this Statute, which I can find is the only authority for the Highway Administrator to act at all, clearly indicates that it is right to prescribe toll rates should only act and operate prospectively; he has given no authority to review past petitions. Nor can he make such a determination, I think the same thing applies or the same reasoning applies to his failure to act upon the unreasonableness of past rates, because I don't find any statutory authority to make such a determination, nor can it be said, that such authority is implied for decision, that I will later talk about, clearly indicates that the regulating Agency or Administrator is limited by the statutory authority and has no implied authority. While the Plaintiff in this case did protest to the Defendant, Port Authority, about paying the higher tolls imposed and did inquire as to what would result if the toll schedule was later reduced, this point apparently was never presented to or if it was, it was never considered or acted upon by the hearing Examiner or by the Highway Administrator. And I am disposed to believe and to think that their failure to do this was a silent expression or recognition that they have no authority to act in the matter. As far as granting reparations is concerned, it is to be noted that the Bridge Act I quoted from fails to provide for any reparations, and this would seem to indicate that Congress did not intend that reparations be allowed in the event there was a reduction of tolls ordered, if indeed there was such a right at all at common-law. The authority doesn't seem to be clear in the situation although there is eminent authority that there is a common-law right to reparations in given situations.

I think the case of Texas and Pacific Railway Company versus Abilene Cotton Oil Company, recorded in

204 US426, decided, 1906 and the T.-I.-M.-E. Case referred to as T.I.M.E. around here, that is how it gets its name versus the United States 359US464, 1959; and the Montana-Dakota Utilities Company versus Northwest Public Service Company, 341US246, decided in 1950, are controlling in this situation. They influenced my decision. The majority opinion in each of these cases called that the absence of Congress in prescribing a right upon the regulating agency to deal with past rates or to award reparations is a clear indication that the reparations may not be obtained in an action in the law courts.

The court in the T.I.M.E. Case clearly held that Congress when inacting, now appears to be Part 2 of the Interstate Commerce Act dealing with motor carriers, did not give the Interstate Commerce Commission the right to deal with past rates was a clear indication that there was no right to recover for past rates which might be considered to be unreasonable and unjust. And that there was no right at law to recover for these accesses in an action in the law court.

There was a situation presented to the court in the Texas-Abilene Case and the same principal followed by the Supreme Court in the Montana-Dakota Case which dealt with the Federal Power Act, which oddly enough is quite similar in retrospect to the Bridge Act in that although it gives the Federal Power Commission to rightly regulate just and reasonable rates but Congress omitted to give the Power Commission the right to deal with past rates or to order reparations.

Even the dissenters in the Montana Case recognized this principal of law and agreed if that is all that was involved in that case there would be no question about

the correctness of the majority opinion. But the dissenters in that case was whether the matter should be reared back to the Federal Power Commission to make a determination in any other of the law courts. The majority disagreed and held that there should not be any such reference.

I don't think that the case of Hewitt-Robbins, Inc. verses the Eastern Freight Inc., 371US, year decided, 1962, changes the law any; there the action was approved by the Supreme Court to allow a recovery from a carrier or violation of the breach of its duty to route the most economical route for the benefit of the shipper.

The Plaintiff in this case further argues that since the Bridge Act is silent in concerning the power of the Administrator to regulate and deal with past tolls that this should mean that Congress did not intend to foreclose the Plaintiff's right to recover reparations in actions at law. But if the reasoning of the United States Supreme Court in the Abilene-Montana-Dakota, and T.I.M.E. Cases is to apply as I think it does, the silence of Congress to legislate the matter is a clear indication that they intend to foreclose or to prevent any reparations by reason of past tolls; which certainly would have a right to assume that Congress was aware of these decisions of the United States Supreme Court; and if they intended that different ruling to apply they would have so enacted.

Of course, as far as the Plaintiff's motion, no summary judgment is concerned. I am even further concerned about the problems as to whether or not there is a determination that the past tolls or the original increased tolls schedule was unreasonable, this could only result from an implication that when the Highway Administrator in

his order of September 1968 determined that seventy-five cents was a reasonable and just toll as far as Plaintiff's buses are concerned, that this impliedly meant that a dollar was unreasonable and unjust. So I don't think that the Plaintiff is entitled to summary judgment with that kind of implication. But since I have reached the conclusion that he would have no right to make such a determination it would make no difference; nor would I have a right to refer the matter back to anyone to make such a determination; nor do I think this Court has any right to review the toll schedule to determine whether or not the past tolls were unreasonable or unjust.

I think I have touched on all the arguments raised by counsel, and I would order summary judgment in favor of the Defendant, against the Plaintiff. Now, if I have not, Mr. Fryling, I will be glad to hear you on the points that you think you have raised that I have not covered.

Mr. Fryling: The only thing that occurs to me, your Honor, is the point I made this morning on the timing of the Highway Administrator's intervention. I refer to the matters not in the record. Now, whether this raises a fractional issue.

The Court: I did not ignore it because that was outside the record; I didn't mean it that way. I don't think there is any dispute about the timing or scheduling of all these events, and I don't know that he had a right to, the Highway Administrator had a right, to order a suspension of the rates.

Mr. Fryling: I conceded not.

The Court: If he had such a right not to, then I don't think he could make his determination retroactive.

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I must compliment both counsel on the briefs, they were of considerable help to the Court. All I can say is you can't win them all.

Mr. Fryling: I want to express my appreciation to the Court not only to the time spent in listening to us but the time obviously spent in studying the question.

Mr. Fluharty: I will prepare the appropriate order, your Honor, thank you.

Appendix B

Order for Summary Judgment

(Filed July 9, 1970)

Superior Court of New Jersey
Law Division—Camden County.

Civil Action

Public Service Coordinated Transport,
a corporation of New Jersey,

Plaintiff.

v.

Delaware River Port Authority, a body corporate and politic created by compact between the State of New Jersey and the Commonwealth of Pennsylvania,

Defendant.

This matter having come on for hearing on cross-Motions for Summary Judgment filed by plaintiff and defendant in the above-entitled matter; and the Court having heard and considered the argument of counsel and having determined there is no genuine issue as to any material fact and that defendant is entitled to a judgment as a matter of law:

Now, therefore, upon good cause being shown, it is on this 9th day of July, 1970:

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ORDERED that judgment be entered in favor of the defendant, Delaware River Port Authority, and against the plaintiff, Public Service Coordinated Transport.

NORMAN HEINE
J.S.C.

I hereby consent to the form of the above judgment.

(s) WALTER S. CRAMER
Attorney for Plaintiff

Appendix B

OPINION OF APPELLATE DIVISION APPEAL
(114 N. J. Super. 334)

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

PUBLIC SERVICE COORDINATED TRANSPORT, a corporation of New Jersey,

Plaintiff-Appellant,

v.

DELAWARE RIVER PORT AUTHORITY, a body corporate and politic created by compact between the State of New Jersey and the Commonwealth of Pennsylvania,

Defendant-Respondent.

Argued March 29, 1971—Decided April 14, 1971.

SYNOPSIS

Action by bus company against Port Authority to recoup difference between per trip rate found by hearing officer to be above zone of reasonableness and subsequent per trip rate found to be within zone of reasonableness by Federal Highway Administrator. The Superior Court, Law Division, entered judgment from which plaintiff appealed. The Superior Court, Appellate Division, Fritz, J. A. D., held that matter of tolls for vehicular crossings of bridges owned and operated by Port Authority was subject of regulatory legislation sufficient to extinguish a

common law right to reparations if such existed, and thus bus company was not entitled to recoup difference between per trip rates.

Affirmed.

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1. States 193

Charges paid to government authorities may be recouped in cases where there is no proper warrant for the charge.

2. Bridges 33

Matter of tolls for vehicular crossings of bridges owned and operated by Port Authority was subject of regulatory legislation sufficient to extinguish a common law right to reparations if such existed, and thus bus company was not entitled to recoup difference between per trip rate found by hearing officer to be above zone of reasonableness and subsequent per trip rate found to be within zone of reasonableness of Federal Highway Administrator. General Bridge Act of 1946, § 503, 33 U. S. C. A. § 526; Interstate Commerce Act, § 216, 49 U.S.C.A. § 316.

3. Bridges 33

Question of reasonableness of bridge tolls is not a matter for the courts, but has been exclusively preempted by legislation imposing obligation upon proper administrative authorities under regulation of the General Bridge Act of 1946. General Bridge Act of 1946, § 503, 33 U. S. C. A. § 526.

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Before Judges GOLDMANN, LEONARD and FRITZ.

Mr. Richard Fryling argued the cause for appellant (*Mr. Walter S. Cramer*, attorney.)

Mr. E. Stevenson Flukarty argued the cause for respondent (*Messrs. Duane, Morris and Heckscher*, attorneys, *Mr. Roland Morris*, of counsel).

The opinion of the court was delivered by

FRITZ, J.A.D. This is an action by plaintiff Public Service Coordinated Transport to recover from defendant Delaware River Port Authority a portion of certain bridge tolls paid under protest. Plaintiff paid these tolls from a date when defendant raised the tolls until a reduction in the tolls some months later following an administrative hearing regarding the reasonableness of the toll structure. Plaintiff seeks to recoup the difference between the amount of the tolls paid and the later adjustment.

The essential facts are not in dispute. Defendant is a bistate body corporate and politic created by compact between the State of New Jersey and the Commonwealth of Pennsylvania, consented to by the Congress of the United States. That compact authorized defendant to own and operate the Walt Whitman and Benjamin Franklin Bridges which cross the Delaware River between Camden, New Jersey, and Philadelphia, Pennsylvania.

Defendant's toll rates have at all times been and remain subject to the provisions of section 503 of the General Bridge Act of 1946 as amended (33 U.S.C. § 526), which reads as follows:

Amount of tolls

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> If tolls shall be charged for the transit over any interstate bridge of engines, cars, street cars, wagons, carriages, vehicles, animals, foot passengers, or other passengers, such tolls shall be reasonable and just, and the Secretary of Transportation may, at any time, and from time to time, prescribe the reasonable rates of toll for such transit over such bridge, and the rates so prescribed shall be the legal rates and shall be the rates demanded and received for such transit.

Plaintiff is a motor carrier of passengers for hire and operates, among other services, interstate service between points in New Jersey and points in other states, including the Commonwealth of Pennsylvania. Its buses annually make numerous crossings over the Delaware River on defendant's bridges.

Defendant charges tolls for vehicular crossings of the aforementioned bridges. During the latter part of January 1968 defendant announced its intention of increasing its various toll rates effective February 1, 1968. The purpose of such increase was to provide financing for the construction of two new bridges, a high-speed transportation facility between Lindenwold, New Jersey, and Philadelphia, and certain other facilities and improvements. Included among other increases was the raising of the bus toll rate from 50¢ to $1 per crossing.

Subsequent to the increase in rates, complaints with respect thereto were made to the Federal Highway Administrator who, by virtue of a chain of legislation and delegation, succeeded to the authority of the Secretary of the Army as prescribed in section 503 of the General Bridge Act.

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An administrative hearing plumbed the matter in depth. Plaintiff, among others, participated fully. The hearing examiner, on extensively detailed findings and conclusions, determined in part, that the bus tolls should be reduced and recommended a 10% downward adjustment to 90¢. We note that the Federal Highway Administration was represented as an interested entity at the hearing and that its brief, filed for the hearing officer's benefit, concluded that "a reduction should be made in bus tolls from $1.00 to 75 cents or in the alternative a 10% discount be granted busses based on frequent use; and that with this adjustment the tolls should be found just and reasonable."

Despite an apparently contrary finding below, we are satisfied that the hearing officer made a specific finding "that the present bus tolls [*i.e.*, $1] are above the zone of reasonableness."

Exceptions to the report and the recommended order were filed with the Federal Highway Administrator who, on September 11, 1968, filed his opinion. With the express exception of the bus tolls, about which more later, the Administrator concluded that "the examiner's recommended toll structure * * * is just and reasonable and [I] am adopting the findings of fact he has made." We conceive this to be an adoption of the finding of unreasonableness with respect to the $1 bus toll, although it should be noted that the Administrator found later (in an opinion and order filed on December 11, 1968, on a petition for reconsideration by the City of Philadelphia) that "the Administrator did conclude that the Port Authority had made a prima facie showing that its toll schedule was reasonable. Although the opinion did not specifically so state, that conclusion is implicit." This subsequent opinion and or-

der denied the petition for reconsideration and specifically declared that "the proceedings in this case are hereby terminated."

With respect to the exception concerning the bus tolls, the Administrator concluded his earlier opinion as follows:

> I find that if the present toll schedule is revised so as to (1) reduce the present bus toll rate by 25 percent, and (2) provide a 10 percent scrip discount for trucks over 7,000 pounds gross weight as recommended by the examiner, that the resulting toll schedule is reasonable and just. Unless the DRPA toll schedule is so revised within 20 days from the date of this opinion the Administrator will issue an order prescribing such rates as the legal rates to be charged by the Authority.

Defendant did not seek administrative or judicial review or reconsideration of the Administrator's action, nor did it wait for the Administrator to implement his opinion by order. Defendant reduced the bus toll rate from $1 to 75¢, effective October 1, 1968.

Plaintiff seeks reimbursement for the difference between the $1 per trip it paid during the period from February 1 to October 1, 1968, and the 75¢ per trip rate found to be within the zone of reasonableness by the Administrator and fixed by defendant as the toll effective October 1, 1968. The parties agree that during this period plaintiff's buses made 465,125 crossings at the $1 rate and the amount in controversy is established to be $116,281.

Plaintiff sued defendant in the Law Division of the Superior Court for these damages, asserting that "the amount

so charged and collected by defendant was unreasonable and unjust, was excessive to the extent of 25¢ per crossing, and to that extent was illegal by virtue of the provisions of Section 503 of the General Bridge Act of 1946, 60 Stat. 847, 33 U.S.C. § 526." An answer was filed by defendant, who then responded to plaintiff's appropriate request for admissions, from which record the foregoing facts appear. As observed above, these facts are not in dispute. Cross-motions for summary judgment were filed. This appeal is from a summary judgment entered in favor of defendant and from denial of plaintiff's motion for summary judgment.

We concur in the result reached below.

[1] Plaintiff bottoms its action upon the existence of a common law right of reparations. Although the cases are not in harmony and the matter cannot be said to be entirely free from doubt, it would appear that such a right existed. *Texas and Pacific Railway Company* v. *Abilene Cotton Oil Company*, 204 U. S. 426, 27 S. Ct. 350, 51 L. Ed. 553 (1907) (hereinafter *Abilene*); *cf. Ocean Grove Camp Meeting Ass'n* v. *Bradley Beach*, 91 N. J. L. 364 (C. P. 1918), aff'd o. b., 93 N. J. L. 249 (E. & A. 1919), where it is said (91 N. J. L. at 366) that "the law raises an assumption to refund the money which can no longer be honestly retained." There is authority to the contrary. *Atlantic Lumber Corp.* v. *Southern Pacific Co.*, 47 F. Supp. 511 (D. Ore. 1942). It appears clear that charges paid to governmental authorities may be recouped in cases where there is no proper warrant for the charge. *Kastens* v. *West New York*, 88 N. J. Super. 224 (App. Div. 1965); *Smith* v. *Jersey City*, 52 N. J. L. 184 (E. & A. 1889); *Forbes Pioneer Boat Line* v. *Board of Commissioners*, 258 U. S. 338, 42 S. Ct. 325, 66 L. Ed. 647 (1922), reversing 80 Fla. 252, 86

So. 199 (Sup. Ct. 1920). But *cf. Alfred Vail Mutual Ass'n v. Halpin (New Shrewsbury)*, 107 N. J. Super. 517 (App. Div. 1969), aff'd 58 N. J. 40 (1971).

[2] We need not resolve here the issue of the existence of reparations at common law, since we are satisfied that under *Abilene*, *supra*, and *T. I. M. E., Inc. v. United States*, 359 U. S. 464, 79 S. Ct. 904, 3 L. Ed. 2d 952 (1959), the matter of these bridge tools is the subject of regulatory legislation sufficient to extinguish a common law right to *reparations if such existed.*

The matter is not without difficulty. Reduced to basic analysis the holdings in *Abilene* and *T. I. M. E.* seem at first blush to converge and blend into the unlikely propositions that: If sanctions are provided in the legislation, an intent to extinguish the common law right is demonstrated. If sanctions are not provided, the same intent can be found on the basis that the legislative body, having elsewhere provided for sanctions and having thus recognized its power to impose such sanctions, would have provided for them if they were intended. We suspect an implicit judicial recognition, with which our own opinion accords, that common law sanctions are, in all practicality, inconsistent with legislative regulation where rates for public utilities—*e.g.*, bridge tolls—are concerned. Consistent with the rationale of *Abilene* and the majority opinion in *T. I. M. E.*, we hold to the opinion that in this day of universal administrative control of rate making in the public interest, such rule is sound. Nor should there be any necessity to arrive at such a declaration by a tortured application of the factual situation.

Thus viewed, any irrationality between *T. I. M. E.* and *Abilene*, so vigorously decried by the dissent in *T. I. M. E.*

where Justice Black complained he was "unable to understand why the Court strains so hard to reach so bad a result," not only can be explained and understood, but also serves to recall the wisdom of Justice Holmes in his observation that "various circumlocutions" are employed because "constitutional principles must leave some play to the joints of the machine." *Forbes Pioneer Boat Line* v. *Board of Commissioners, supra,* 258 U. S. at 340, 42 S. Ct. at 326, 66 L. Ed. at 649 (1922).

Be all this as it may, the fact remains that we are controlled by the *T. I. M. E.* decision. It was there held (in a determination that the *Abilene* result "did not rest upon the fact that under Part I [of the Interstate Commerce Act] the I. C. C. had reparations authority with respect to unreasonable charges paid by shippers") that "the crucial question of reasonableness [cannot] be decided by the courts." Or as pungently paraphrased in the dissent, that "primary jurisdiction [in the administrative body] is inconsistent with court remedies of any kind."

It is appropriate to observe here that a major thesis of the dissent in *T. I. M. E.* now seems unsound. The dissent insisted that legislative history of the Motor Carrier Act involved in *T. I. M. E.* (but not in *Abilene*) demonstrated congressional understanding of *Abilene* that if sanctions were not expressly provided, the common law sanctions would be preserved. Despite the far-reaching import of the *T. I. M. E.* decision, with the attendant insistence of the dissent that congressional intent had been subverted, Congress on August 24, 1962, by Pub. L. 87-595, § 1, 76 Stat. 397, amended section 216 of the Motor Carrier Act, 49 U.S.C. § 316, having to do with rates, without legislatively altering the impact of *T. I. M. E.* and without changing

the provision of that act which, before *T. I. M. E.* and since, reads, "Nothing in this section shall be held to extinguish any remedy or right of action not inconsistent herewith." We presume that the legislators were aware of the *T. I. M. E.* holding.

The practical reasons for the soundness of such a rule are obvious. If common law sanctions were preserved to plaintiff, they would of necessity be preserved in any similar situation to the many hundreds of thousands of commuters and transients who used such a bridge and paid a toll later found to be above the zone of reasonableness. The multitude of claims which might follow, all potentially the subject of litigation in the courts, extends beyond reason. Worse, the disparate results almost certain to flow from a succession of trials would demonstrate precisely the inequalities abhorred in *Abilene*. As in *Abilene*, this alone would frustrate the purpose of the legislation and is inconsistent with its intent.

[3] The question of reasonableness of bridge tolls is not a matter for the courts, but has been exclusively preempted by legislation imposing the obligation upon the proper administrative authority under the regulation of section 503 of the General Bridge Act of 1946.

Even were this not so, the result achieved below was correct. There is no disagreement, even as between the majority and dissent in *T. I. M. E.*, that reasonableness of rates is in any case first a matter for the administrative agency whose "primary jurisdiction" is unquestioned. In the instant matter the only determinations heretofore administratively made are that 81 was above the zone of reasonableness and that 75¢ was within the zone of reasonableness. The extent to which the 25¢ differential, or any

part thereof, has crossed the line marking the extremes of the zone of reasonableness has not been so determined, and should in no event be first determined by a court. *Abilene* and *T. I. M. E.* contain nothing to the contrary. In fact, it would appear that the litigants in *T. I. M. E.* both conceded that "the question of reasonableness of past rates cannot itself be decided in the courts" but is a matter for administrative agency determination. 359 U. S. at 468, 79 S. Ct. at 907, 3 L. Ed. 2d at 956.

Montana-Dakota Utilities Co. v. *Northwestern Public Service Co.*, 341 U. S. 246, 71 S. Ct. 692, 95 L. Ed. 912 (1951), where fraud was asserted, and *Hewitt-Robins, Inc.* v. *The Eastern Freight-Ways, Inc.*, 371 U. S. 84, 83 S. Ct. 157, 9 L. Ed. 2d 142 (1962), having to do with routing rather than rates, are distinguishable.

The judgment is affirmed. No costs.

Appendix B

ORDER OF SUPREME COURT OF NEW JERSEY GRANTING CERTIFICATION (58 N. J. 395)

SUPREME COURT OF NEW JERSEY

PUBLIC SERVICE COORDINATED TRANSPORT,

v.

DELAWARE RIVER PORT AUTHORITY.

July 7, 1971. Petition for certification granted. (See 111 N. J. Super. 331).

Appendix B

OPINION OF SUPREME COURT OF NEW JERSEY
(59 N. J. 531)

SUPREME COURT OF NEW JERSEY

TRANSPORT OF NEW JERSEY, a corporation of New Jersey,

Plaintiff-Appellant,

v.

DELAWARD RIVER PORT AUTHORITY, a body corporate and politic created by compact between the State of New Jersey and the Commonwealth of Pennsylvania,

Defendant-Respondent.

Argued November 22, 1971—Decided December 13, 1971.

SYNOPSIS

Action by bus company against Port Authority to recoup allegedly excessive tolls. The Superior Court, Law Division, entered judgment from which bus company appealed. The Superior Court, Appellate Division, 114 N. J. Super. 334, 276 A. 2d 378, affirmed, and petition for certification was granted. The Supreme Court held that charges paid to government authorities as tolls for buses on interstate bridges was not subject to common-law action for reparations even though charges were declared excessive by Federal Highway Administrator.

Affirmed.

Jacobs, J., concurred in result.

Appendix B

1. Bridges 33

Federal Highway Administrator's action in reducing toll for buses crossing interstate bridge from $1 to 75 cents must be deemed finding that 75 cents was reasonable charge and anything above it was unreasonable.

2. Bridges 33

Charge paid to government authorities as toll for buses on interstate bridges was not subject to common-law action for reparations even though charges were declared excessive by Federal Highway Administrator.

Reported at 114 N. J. Super. 331 (App. Div. 1971).

Mr. Richard Fryling argued the cause for appellant (*Mr. Walter S. Cramer*, attorney).

Mr. Raymond W. Uliase argued the cause for respondent (*Mr. E. Stevenson Fluharty*, attorney; *Mr. Roland Morris, Messrs. Duane, Morris and Heckscher*, of the Pennsylvania bar, on the brief).

PER CURIAM. The defendant Authority raised the toll for buses from 50 cents to $1.00 on two interstate bridges between New Jersey and Pennsylvania. Later the Federal Highway Administrator found the increase to be unwarranted and called for a reduction of 75 cents. Plaintiff brought this suit to recover the difference with respect to tolls paid in the intervening period. Judgment was entered for defendant. The Appellate Division affirmed, *Public Service Coordinated Transport* v. *Delaware River Port Authority*, 114 N. J. Super. 331 (1971), and we granted plaintiff's petition for certification, 58 N. J. 595 (1971).

[1, 2] The Appellate Division concluded the Administrator did not determine the extent to which the 25-cent

differential or any part of it "had crossed the line marking the extremes of the zone of reasonableness." With this we disagree. The Administrator's action must be deemed to be a finding that 75 cents is *the* reasonable charge and anything above it is unreasonable. The Appellate Division also held that a common law action for reparations was barred by the majority opinion in *T. I. M. E., Inc. v. United States*, 359 U. S. 464, 79 S. Ct. 904, 3 L. Ed. 2d 952 (1959). We think this is so, and for that reason we affirm the judgment. But since, if the subject were not thus controlled by the cited case, we would not be inclined to say that an action for reparations should not lie after an administrative finding that the rate was unreasonable, we cannot subscribe to so much of the opinion of the Appellate Division as suggests the result reached here is the just one.

For the reason given, the judgment is affirmed.

JACOBS, J., concurs in result.

For affirmance—Chief Justice WEINTRAUB and Justices JACOBS, FRANCIS, PROCTOR, HALL, SCHETTINO and MOUNTAIN—7.

For reversal—None.

Appendix B

SUBSTITUTION OF ATTORNEY
SUPREME COURT OF NEW JERSEY

A-26 SEPTEMBER TERM 1971
CIVIL ACTION

TRANSPORT OF NEW JERSEY,
a corporation of New Jersey,

Plaintiff-Petitioner,

vs.

DELAWARE RIVER PORT AUTHORITY, a body corporate and politic created by compact between the State of New Jersey and the Commonwealth of Pennsylvania,

Defendant-Respondent.

I hereby consent to the substitution of Wiliam S. Smith, Esq., in my place and stead as attorney for the plaintiff-petitioner, Transport of New Jersey.

/s/ WALTER S. CRAMER
Walter S. Cramer
Attorney for Plaintiff-Petitioner
Transport of New Jersey

March 6, 1972

APPENDIX C

Conflicting Opinions

DECISION IN HEWITT-ROBINS, INC. *v.* EASTERN FREIGHT-WAYS, INC.—371 U. S. 84 (Second Circuit)

HEWITT-ROBINS INCORPORATED,

v.

EASTERN FREIGHT-WAYS, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 37. Argued October 11, 1962.—Decided November 19, 1962.

Petitioner brought a common law action in a Federal District Court against respondent, a common carrier by motor vehicle, to recover the difference between charges made by respondent at its established interstate rate and lower charges established by its intrastate rate on shipments from Buffalo, N. Y., to New York City. Petitioner alleged that it made the shipments without specifying the routes and that respondent violated its duty by shipping the goods over its established interstate route at its higher rate rather than over its established intrastate route at its lower rate. The Interstate Commerce

Commission found that the practice was unreasonable. *Held*: The complaint stated a cause of action upon which relief could be granted, and such right of action was saved by § 216 (j) of the Motor Carrier Act. *T.I.M.E., Inc.* v. *United States*, 359 U. S. 464, distinguished. Pp. 84-89.

293 F. 2d 205, reversed.

Harry Teichner argued the cause and filed briefs for petitioner.

Wilfred R. Caron argued the cause for respondent. With him on the briefs was *Milton D. Goldman*.

MR. JUSTICE CLARK delivered the opinion of the Court.

This is an action by a shipper to recover from a motor carrier the difference in rate charges resulting from a practice of the latter of carrying unrouted intrastate shipments on its interstate routes at higher rates than those applicable to its available intrastate routes. The District Court for the Southern District of New York stayed the action awaiting a finding by the Interstate Commerce Commission as to the reasonableness of the practice. The Commission found it unreasonable* under the Motor Carrier

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* 302 I. C. C. 173. Respondent brought an action against the United States and the Commission in the District Court for the District of New Jersey, seeking to set aside the report and the cease-and-desist order entered by the Commission. After the complaint was filed the Commission amended its disposition by striking out the cease-and-desist order, leaving only its declaratory findings as to past practices. The three-judge court, relying upon our decision in

(*Footnote continued on following page*)

Appendix C

Act, 59 U. S. C. §§ 301-327, and subsequently the District Court dismissed the complaint on the ground that the Act neither provided any reparation remedy nor preserved one at common law. 187 F. Supp. 722. The Court of Appeals, one judge dissenting, affirmed on the same grounds. 293 F. 2d 205. Each court bottomed its decision upon *T. I. M. E. Inc.* v. *United States*, 359 U.S. 464 (1959). Having some doubts as to the appositeness of that case and because of the importance of the question in the administration of the Act, we granted certiorari. 368 U. S. 951. We have concluded that *T. I. M. E. Inc., supra*, does not control the issue here and therefore reverse the judgments.

The petitioner alleges that between January 1, 1953, and February 1, 1955, it delivered numerous shipments of foam rubber pads to respondent, a common carrier by motor vehicle, for transportation from Buffalo, N. Y., to New York City. It claims that while the shipments were

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(*Footnote continued from preceding page*)

United States v. *Interstate Commerce Commission*, 337 U. S. 426 (1949), held that as a three-judge court it had no authority to adjudicate the controversy since no order was under attack. 170 F. Supp. 848. Decision in the action is now held in abeyance by a single judge pending disposition of this litigation. Thus the litigation has been bifurcated into two District Courts, whose further proceedings may yet be separately appealable. This might have been avoided had the District Court for the Southern District of New York followed this Court's admonition that "the courts, while retaining the final authority to expound the statute, should avail themselves of the aid implicit in the agency's superiority in gathering the relevant facts and in marshaling them into a meaningful pattern," *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U. S. 481, 498 (1958), rather than relying upon the shipper to file an adversary proceedings with the Commission.

tendered without specifying the routes of shipment the respondent, contrary to its duty as a common carrier, shipped the pads over its interstate route at the higher tariff that it had on file with the Interstate Commerce Commission rather than over its intrastate route at the lower tariff that it had on file with the Public Service Commission of New York. Excess charges in the sum of $10,000 have been collected by respondent for which petitioner prays judgment.

The sole issue before us is whether the complaint states a cause of action upon which the District Court may grant relief. The gist of the action as alleged is that the shipper had the common-law right and the carrier owed it the duty to ship the pads over the cheapest available route, no adequate justification for not so doing being shown. Nevertheless, petitioner says, the carrier in derogation of this responsibility transported the pads at the higher rate and subjected to the shipper to the $10,000 damage.

No attack is made upon either of the carrier's published tariffs—both are admittedly reasonable. The controversy hinges entirely upon whether the carrier violated its duty to the shipper in selecting the interstate route and the accompanying higher rate which subjected the shipper to the loss, *i. e.*, the difference between the two lawful rates. We believe that the complaint stated a justiciable cause of action. The issue here is a far cry from that in *T. I. M. E. Inc.* v. *United States*, *supra*. There the question, as stated by the Court, was "Can a shipper of goods by a certificated motor carrier challenge in post-shipment litigation the reasonableness of the carrier's charges which were made in accordance with the

tariff governing the shipment?" 359 U. S. 464, 465. The Court determined that such an attack was foreclosed by the "saving clause" of the Act, § 216 (j), 49 U. S. C. § 316 (j), as being inconsistent with the statutory scheme of regulation. We emphasized the built-in protections given shippers against unreasonable rates, at pp. 478-480, citing the 30-day-notice provision of the Act, § 217 (c), as well as the power granted the Commission under § 216 (g) to suspend rates for seven months. The Court concluded that those remedies amply protected the shipper and that the allowance of a judicial remedy would result in undercutting the stability of the rate structure which the statutory procedures sought to insure.

Here the challenge is directed not at the "reasonableness" of the rates but at the carrier's misrouting practice. The question, therefore, is not one of rates but of routes. The determination of rail carriers routing practices has long been within the primary jurisdiction of the Commission. *Northern Pacific R. Co.* v. *Solum*, 247 U. S. 477 (1918). This jurisdiction is the more important in the case of motor carrier routing where alternative routes are greater in both number and variety. Furthermore, selection of the route is usually made on an *ad hoc* basis, precluding preshipment determination of its reasonableness. Unlike rate making there is no statutory procedure by which routing practices may be challenged in advance of shipment. Nor is the shipper by truck accorded even the right given the shipper by rail, under 49 U. S. C. § 15 (8), to select and request a particular route of the carrier. In view of these weighty statutory differences between rate making and routing practices the survival of a damage claim for misrouting appears entirely consistent with the Act. It, therefore, meets the *proviso* of the "saving clause" as well as the teaching of *T. I. M. E. Inc.*

This conclusion is buttressed by the fact that the allowance here of a damage action nowise hampers the efficient administration of the Act, unlike the allowance of such an action as to unreasonable rates. A misrouting claim does not jeopardize the stability of tariffs or of certificated routes, the sole issue being whether the carrier routed the shipment over the cheapest available route, or made a showing of adequate justification for not doing so. Moreover, the allowance of misrouting actions would have a healthy deterrent effect upon the utilization of misrouting practices in the motor carrier field, which, in turn, would minimize "cease and desist" proceedings before the Commission. Finally, and not to be overlooked, the absence of any judicial remedy places the shipper entirely at the mercy of the carrier, contrary to the overriding purpose of the Act. The allowance of such actions would, on the contrary, give neither an unfair advantage.

Those who contend that no judicial remedy is available place much weight on the fact that, as we have said, the Interstate Commerce Commission has primary jurisdiction in routing practices. We put no significance in whether one tags the claim as "overcharges" as Commissioner Eastman apparently did in his testimony before the Senate, see *T. I. M. E. Inc., supra*, at 477-478, n. 18, or whether it is a proceeding involving the "reasonableness" of routing practices. In either case the problem is one originally within the jurisdiction of the Commission. To say, however, that such primary jurisdiction compels the conclusion that the courts are without power to award damages in every instance where the Commission may not award reparations by no means follows. Indeed, the doctrine of primary jurisdiction is designed to apply "where a claim is originally cognizable in the courts,

and . . . enforcement of the claim requires the resolution of issues . . . placed within the special competence of an administrative body . . . ." *United States* v. *Western Pacific R. Co.*, 352 U. S. 59, 64 (1956); see Davis, Administrative Law Treatise, § 19.01 (1958). The practice of the Commission in making such determination in the first instance, even though it has no power to award reparations in a given case, has long been exercised, *Bell Potato Chip Co.* v. *Aberdeen Truck Line*, 43 M. C. C. 337, 343 (1944), and is supported by a long line of cases. See *Thompson* v. *Texas Mexican R. Co.*, 328 U. S. 134 (1946), and cases there cited. Be this as it may, the survival of a judicial remedy under the saving clause of § 216 (j) cannot be determined on the presence or absence in the Commission of primary jurisdiction to decide the basic question on which relief depends. Survival depends on the effect of the exercise of the remedy upon the statutory scheme of regulation. According to § 216 (j), if the remedy is inconsistent with that scheme it does not survive. In *T. I. M. E. Inc.*, we found inconsistencies and hence no judicial remedy survived. Here, as we have indicated, rather than running interference against the Act the exercise of the judicial remedy supports its overall purposes and is nowise inconsistent with the congressional scheme embodied within its four corners. The remedy, therefore, survives and the judgment is

Reversed.

Mr. Justice Harlan, whom Mr. Justice Stewart and Mr. Justice White join, dissenting.

With deference, I consider that the *T. I. M. E.* case, 359 U. S. 464, plainly controls this one. That it does control is not and could hardly be gainsaid to the extent that

the complaint purports to allege a statutory cause of action, that is, one based on the terms of the Motor Carrier Act itself. *T. I. M. E.*, at 468-472. However, construing the complaint as alleging also a common-law cause of action, the Court holds that such an action is "not inconsistent" with the Motor Carrier Act and is therefore preserved by § 216 (j) of the statute.

The Court's decision rests primarily on the significance it accords to the existence of certain administrative procedures available to shippers to challange *rates* in advance of their application, see §§ 216 (g) and 217 (c) of the Act, and the lack of such protective remedies in the case of *routing* practices. In addition, three further considerations are asserted to support its conclusion: (1) a misrouting claim does not jeopardize the stability of tariffs or of certificated routes, whereas to permit actions attacking the reasonableness of rates would hamper the efficient administration of the Act; (2) the allowance of misrouting actions will deter misrouting practices and decrease the number of "cease and desist" proceedings before the I.C.C.; (3) the absence of any judicial remedy would put the shipper entirely at the mercy of the carrier, contrary to the purpose of the Motor Carrier Act. This reasoning, I submit, entirely misconceives the basis of the *T. I. M. E.* decision.

The result reached in *T. I. M. E.* basically rested on two interdependent considerations: (1) the courts may not adjudicate a matter over which the Commission has been given primary jurisdiction, 359 U. S., at 473-474; (2) since the Commission must decide whether a rate is reasonable and Congress has denied it the authority to award reparations for past unreasonable charges, to allow a judicial remedy for recovery of past rate charges would

"permit the I. C. C. to accomplish indirectly what Congress has not chosen to give it the authority to accomplish directly." *id.*, at 475.

Both of these factors are present here. There can be no doubt that under § 216 (b) and (c) of the Interstate Commerce Act the Commission has primary jurisdiction over the complained of misrouting practices,[1] as indeed the Commission's action taken with respect to these very practices, *Hewitt-Robbins, Inc. v. Eastern Freight-Ways, Inc.*, 302 I. C. C. 173, and the Court's opinion in this case show. Nor is it suggested that the Commission possesses any reparations authority with respect to such misrouting. The conjunction of these factors thus brings *T. I. M. E.*, decided only four Terms ago, into full play.

1. It is true that in this instance the Act does not contain certain protective provisions as in the case of rate making. This cannot, however, serve to distinguish *T. I. M. E.*, whose determination of the congressional purpose underlying the Motor Carrier Act was based on considerations that stand quite independently of the impact of particular provisions of the statute. It should also be noted that the absence of such provisions does not mean that carriers may follow misrouting practices with impunity. Section 212 (a) of the Act provides that

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[1] Section 216(b) of the Interstate Commerce Act, 49 U. S. C. § 316(b), provides in pertinent part: "It shall be the duty of every common carrier of property by motor vehicle . . . to . . . observe . . . reasonable . . . practices . . . relating to or connected with the transportation of property in interstate . . . commerce." Section 216 (c) provides that whenever "the Commission shall be of the opinion that any . . . practice . . . is or will be unjust or unreasonable . . . it shall determine . . . the lawful . . . practice."

the Commission may, on its own initiative or on complaint, suspend or revoke certificates, permits, or licenses for willful failure to comply with any provision of the Act or any order or regulation of the Commission. Under § 216 (e) the Commission may order the termination of an unjust practice and prescribe the lawful practice to be followed. Section 222 (a) imposes fines for violations of the Act, and § 222 (b) confers jurisdiction on the District Courts to enjoin violations of the Act when application is made by the Commission.

2. If the issue as to the reasonableness of a routing Court recognizes as essential, allowance of a judicial practice is referred to the Commission, a procedure the remedy for misrouting will not jeopardize the stability of tariffs or of certified routes. But the suggestion that such a danger was presented by a court action challenging unreasonable rates and that this contributed to the decision in *T. I. M. E.* is manifestly untenable. It was conceded there, as of course it had to be under prior decisions of this Court,[2] that the primary jurisdiction doctrine compelled referral to the Commission of all issues as to the reasonableness of the rates. Since even if a judicial remedy were allowed the Commission would have been the tribunal deciding the basic question, the course of decision would have been uniform and there would not have been, any more than here, interference with the Commission's functioning in the area of its special competence or any threat to the stability of the rate structure. Moreover, the possibility that rate actions might constitute a

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[2] See, *e.g.*, *Texas & Pacific R. Co.* v. *American Tie & Timber Co.*, 234 U. S. 138; *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426.

threat to the rate structure through stimulating excessive litigation could hardly have been regarded as a significant factor in *T. I. M. E.*, for it was there observed that only a handful of actions to recover for unreasonable charges had been brought in the previous 24 years. 359 U. S., at 479. And if the Court now believes that to have been a relevant consideration in *T. I. M. E.*, it should certainly be of greater weight with respect to misrouting claims, which are likely to arise more frequently because, as the Court points out, "selection of the route is usually made on an *ad hoc* basis, precluding preshipment determination of its reasonableness."[3]

3. Finally, as to the suggestions that actions such as this should be allowed because of their incidental deterrent effect on misrouting practices and in the interest of justice to shippers, it need only be said that these are matters for the Congress.[4] Our duty is to apply the statute as we find it.

I would affirm.

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[3] If the Court's reference to Commissioner Eastman's statement quoted in *T. I. M. E.*, at 477-478, n. 18, is intended to imply that the present action may be characterized as one for rate "overcharges" and thus is permissible, it should be noted that the "overcharges" to which the Commissioner referred were, as his statement makes clear, charges "above published tariff rates," *id.*, at 478, not those resulting, as alleged here, from the application of a wrong tariff. It is only the former that the Commissioner thought could be recovered "in court as the law now stands." *Id.*, at 478.

[4] So far, Congress has refused to act. See H. R. 8031, 86th Cong., 1st Sess. (1959); 359 U. S., at 471-472 and notes 10, 11.

Appendix C

DECISION IN T. I. M. E. INC. V. UNITED STATES—359 U. S. 464 (FIFTH CIRCUIT)

OCTOBER TERM, 1958.

T. I. M. E. INCORPORATED,

v.

UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 68. Argued January 20, 1959.—Decided May 18, 1959.*

A shipper of goods by a motor carrier certificated by the Interstate Commerce Commission under the Motor Carrier Act of 1935 cannot challenge in post-shipment litigation the reasonableness of the carrier' past charges, which were made in accordance with the applicable tariffs filed under § 217 of the Act. Pp. 465-480.

(a) The structure and history of Part II of the Interstate Commerce Act (the Motor Carrier Act) —when compared with Parts I and III, which expressly grant such rights to shippers by rail and water—lead to the conclusion that §§ 216 (b) and

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* Together with No. 96, *Davidson Transfer & Storage Co., Inc.* v. *United States*, on certiorari to the United States Court of Appeals for the District of Columbia Circuit.

(d) were not intended to give shippers by motor carriers a statutory cause of action for recovery of past charges at allegedly unreasonable rates or to enable them to assert "unreasonableness" as a defense in suits by motor carriers to recover past charges at applicable tariff rates. Pp. 468-472.

(b) The Motor Carrier Act does not contemplate that shippers shall have a right at common law to dispute in court litigation the reasonableness of past charges at applicable tariff rates subject to determination of the issue of reasonableness by referral to the Commission. Pp. 472-480.

252 F. 2d 178 and 104 U. S. App. D. C. 72, 259 F. 2d 802, reversed.

W. D. Benson, Jr. argued the cause and filed a brief for petitioner in No. 68.

Bryce Rea, Jr. argued the cause for petitioner in No. 96. With him on the brief was *Edgar Watkins.*

Morton Hollander argued the causes for the United States. With him on the brief were *Solicitor General Rankin* and *Assistant Attorney General Doub.*

MR. JUSTICE HARLAN delivered the opinion of the Court.

Petitioners are interstate motor common carriers, certificated by the Interstate Commerce Commission (I.C.C.) under the Motor Carrier Act of 1935.[1] Section 217 of that Act, 49 U. S. C. § 317, requires such carriers to file their transportation charges as tariffs with the I. C. C. These tariffs remain effective until suspended or changed

[1] Interstate Commerce Act, Part II, 49 Stat. 543, as amended, 49 U. S. C. § 301 *et seq.*

in accordance with specified procedures, and so long as they are effective carriers are forbidden to charge or collect any rate other than that provided in the applicable tariff.[2]

These cases present in common a single question under the Motor Carrier Act: Can a shipper of goods by a certificated motor carrier challenge in post-shipment litigation the reasonableness of the carrier's charges which were made in accordance with the tariff governing the shipment?

In No. 68, T. I. M. E. transported several shipments of scientific instruments for the United States from Oklahoma to California. One of the shipments, illustrative of all involved int his litigation, originated at Marion, Oklahoma, and was carried over the lines of petitioner and a connecting carrier to Planehaven, California. At the time, the petitioning carrier had on file with the I. C. C. a tariff relating to such shipments which specified a through rate from Marion to Planehaven of $10.74 per hundredweight. Petitioner was also subject to tariffs which provided a rate of $2.56 per hundredweight from Marion to El Paso, Texas, and of $4.35 per hundredweight from El Paso to Planehaven. The through rate thus exceeded the combination rate by $3.83. T. I. M. E. charged and collected on the basis of the through rate. On postpayment audit by the General Accounting Office under § 322 of the Transportation Act of 1940, 54 Stat. 955, 49 U. S. C. § 66, that office concluded that the combination rather than the through rate was applicable to

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[2] See Motor Carrier Act §§ 216 (e), (g), 217 (b), (c), 49 U. S. C. §§ 316 (e), (g), 317 (b), (c).

this shipment and required T. I. M. E. to refund the difference between the sum collected under the through tariff and that which would have been due under the combination tariffs. This T. I. M. E. did under protest.

Thereafter T. I. M. E. brought suit under the Tucker Act, 28 U. S. C. § 1346 (a) (2), claiming that the through tariff was applicable to the shipment and that it was thus entitled to recover the difference between the through and combination rates. The Government defended on the ground that the combination rate was applicable, and alternatively contended that if the through tariff were applicable the rate specified therein was unreasonably high insofar as it exceeded the combination rate. It asked that T. I. M. E.'s suit be stayed to permit the Government to bring a proceeding before the I. C. C. to determine the reasonableness of the through rate. The District Court in an unreported opinion held that the through rate was applicable, and that neither it nor the I. C. C. had power to pass upon the Government's contention that such rate was *as to the past* unreasonable. Accordingly, the District Court entered summary judgment for T. I. M. E.

The Government appealed, accepting the District Court's determination as to the applicability of the through rate, but contending that the District Court had erred in refusing to refer to the I. C. C. the issue of the reasonableness of that rate as to past shipments. The Court of Appeals reversed, holding that the Government was entitled to an I. C. C. determination upon the question of reasonableness, and that the fact that the Motor Carrier Act gives the I. C. C. no power to award reparations as to admittedly governing past rates does not

prevent that body from passing on the question of past reasonableness when that issue arises in litigation in the courts." 252 F. 2d 178.

In No. 96, petitioner Davidson transported four shipments of goods for the United States from Poughkeepsie, N. Y., to Bellbluff, Va., and billed the United States on the basis of concededly applicable filed tariffs. On post-payment audit the General Accounting Office concluded that a part of these charges was unreasonable and should be refunded to the United States.[3] Davidson refunded under protest the sum demanded, which amounted to $18.34, and then brought suit under the Tucker Act to recover the refund. The Government defended on the sole ground that the applicable rate had been unreasonable. The District Court, without opinion, granted Davidson summary judgment, but on the Government's appeal the judgment was reversed, the Court of Appeals holding that the Government could defend on "unreasonableness" grounds, and directing a referral to the I. C. C. of the issue a to the reasonableness of the rate in question. 104 U. S. App. D. C. 72, 259 F. 2d 802.

[3] This part of the charges was that represented by a "New York State Surcharge," included by Davidson in its rate to recoup the cost of a New York ton-mile truck tax. The tariff including the surcharge had been filed to become effective October 8, 1951. The I. C. C. had suspended the tariff for the maximum period permitted by the Act, but since the inquiry as to its reasonableness was not completed within the suspension period it went into effect on May 8, 1952, and was in effect at the time of shipment. The I. C. C. subsequently found the surcharge to be unreasonable and ordered its excision from Davidson's rates, 62 M. C. C. 117. This order was purely prospective and did not affect the shipments involved here.

Appendix C

We granted certiorari in both cases because of the suggestion that the result reached by the Courts of Appeals conflicted with this Court's decision in *Montana-Dakota Utilities Co. v. Northwestern Pub. Serv. Co.*, 341 U. S. 246, and in order to settle the questions of statutory interpretation involved.[4] 358 U. S. 810.

The courts below held that the right of the United States to resist on the ground of unreasonableness the payment of the charges incurred by it was one deriving from the common law and preserved by § 216 (j) of the Motor Carrier Act.[5] In this Court the government although defending this ground of decision, relies primarily on the proposition that the Motor Carrier Act itself creates a judicially enforceable right in a shipper to be free from the exaction of unreasonable charges as to past shipments even though such charges reflect applicable rates duly filed with the I. C. C. The Government concedes that whatever the source of the asserted right may be, the question of the reasonableness of past rates cannot itself be decided in the courts, but takes the position that when such question arises in court litigation it may properly be referred to the I. C. C. for decision, and the results of that adjudication used to determine the respective rights of the litigants.

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[4] In our view of these cases it becomes unnecessary to consider Davidson's alternative contention that in any event the General Accounting Office had no right under § 322 of the Transportation Act of 1940 to deduct from the carrier's charges the amount claimed by the United States to have been unreasonable.

[5] Section 216 (j), 49 U. S. C. § 316 (j), provides that "Nothing in this section shall be held to extinguish any remedy or right of action not inconsistent herewith."

Appendix C

I.

The contention that the Motor Carrier Act itself creates a cause of action or affords a defense with respect to the recovery of unreasonable rates rests on the provisions of §§ 216 (b) and (d) of the Act, 49 U. S. C. §§ 316 (b), (d), which provide as to interstate motor carriers:

> "(b) It shall be the duty of every [such] common carrier . . . to establish, observe and enforce just and reasonable rates, charges, and classifications, and just and reasonable regulations and practices relating thereto. . . .
>
> "(d) All charges made for any service rendered or to be rendered by any [such] common carrier . . . shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof, is prohibited and declared to be unlawful. . . ."

The Government urges that this language imposes a statutory duty on motor carriers not to charge or collect other than "reasonable" rates, and asks us to imply a cause of action under the Motor Carrier Act for any shipper injured by violation of that duty. We cannot agree.

As this Court recognized in *Montana-Dakota Utilities Co.* v. *Northwestern Pub. Serv. Co.*, 341 U. S. 246, 251, language of this sort in a statute which entrusts rate regulation to an administrative agency in itself creates only a "criterion for administrative application in determining a lawful rate" rather than a "justiciable legal right." In *Montana-Dakota* it was held that the Federal Power Act,

which like the Motor Carrier Act expressly declares unreasonable rates to be "unlawful,"[6] does not create a cause of action for the recovery of allegedly unreasonable past rates. In the absence of any indication that Congress intended that despite the absence of any reparations power in the Federal Power Commission the federal courts should entertain suits for reparation of unreasonable rates, and refer to the Commission the controlling issue of past unreasonableness, the Court declined to permit the Commission to accomplish indirectly through such a proceeding that which Congress did not allow it to accomplish directly.

It is true that under Parts I and III of the Interstate Commerce Act, relating respectively to rail and water carriers, a shipper may litigate as to the reasonableness of past charges even if those charges were based on the applicable and effective filed rates. The structure and history of Part II (the Motor Carrier Act), however, lead to the conclusion that here, as in the Federal Power Act, Congress did not intend to give shippers a statutory cause of action for the recovery of allegedly unreasonable past rates, or to enable them to assert "unreasonableness" as a defense in carrier suits to recover applicable tariff rates.

The very provisions of Part I, and their counterparts in Part III, which give a right of action to shippers against carriers for damages incurred by carrier violations of the Act and provide the mechanics for the enforcement of that

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[6] Section 205 (a) of the Power Act, 49 Stat. 851, 16 U. S. C. § 824(a), provides that "All rates and charges . . . and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful."

right are conspicuously absent in the Motor Carrier Act. Thus, whereas § 8 of Part I[7] provides that "any common carrier subject to the provisions of this chapter [who] shall do . . . any act . . . in this chapter . . . declared to be unlawful . . . shall be liable to the person or persons injured thereby for the full amount of the damages sustained . . . ," Part II has no comparable provision. Again, whereas § 9 of Part I[8] gives an injured shipper the right to sue in the I. C. C. or in the Federal District Court Part II contains no comparable provision. In addition, §§ 13 (1) and 16 of Part I[9] give a shipper claiming reparation the right to proceed in hte Commission and to enforce his reparation award in the courts, and Part II contains no comparable provisions.

To hold that the Motor Carrier Act nevertheless gives shippers a right of reparation with respect to allegedly unreasonable past filed tariff rates would require a complete disregard of these significant omissions in Part II of the very provisions which establish and implement a similar right as against rail carriers in Part I. We find it impossible to impute to Congress an intention to give such a right to shippers under the Motor Carrier Act when the very sections which established that right in Part I were wholly omitted in the Motor Carrier Act.

Further, the I. C. C. itself has consistently recognized that nothing in Part II creates a statutory liability on the part of the carrier for past allegedly unreasonable filed

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[7] 49 U. S. C. § 8.

[8] 49 U. S. C. § 9.

[9] 49 U. S. C. §§ 13 (1), 16.

rates. In the hearings which preceded the passage of legislation in 1949 adding to the Motor Carrier Act a statute of limitations on suits to recover amounts paid to carriers in excess of applicable filed rates, proposals were also made to amend the statute by adding to it provisions similar to those already found in §§ 8, 9, 13, and 16 of Part I. The Commission noted that the proposal "would add to the Interstate Commerce Act a number of new sections which would make common carriers by motor vehicle . . . liable for the payment of damages to persons injured by them through violations of the act. At present this liability exists only in respect of carriers subject to parts I and III. . . ."[10] The suggested changes were not adopted. And in 1957 the Commission again recommended amendment of the Motor Carrier Act to provide a remedy for violation of the statute to persons injured thereby,[11] and once more the measure failed of adoption.

In light of the statute and its history, it is plain that if a shipper has a "justiciable legal right" to recover or resist past motor carrier charges alleged to have been unreasonable, it is necessary to look beyond the Motor Carrier Act for the source of that right.

II.

The Government urges that even if the Motor Carrier Act does not grant the right which is claimed here, the

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[10] Hearings before Senate Committee on Interstate and Foreign Commerce on S. 1194, 80th Cong., 2d Sess., pp. 1, 5, 11-12.

[11] See Hearings before Senate Committee on Interstate and Foreign Commerce on S. 378, 85th Cong., 2d Sess., pp. 3, 12.

Act must at least be read to preserve a pre-existing common-law right of that kind. It relies on § 216 (j) of the statute, 49 U. S. C. § 316 (j), as showing a congressional intention to confirm such a right in its statement that nothing in § 216 "shall be held to extinguish any remedy or right of action not inconsistent herewith." The contention is that the common law recognized the right of a shipper by common carrier to recover exorbitant rates paid under protest,[12] and that although the doctrine of primary jurisdiction requires that the issue of whether rates which are retrospectively challenged were in fact "unreasonable" be determined by the I.C.C., the common-law right may be vindicated in a suit in the courts through referral of the issue of "unreasonableness" to the Commission.

The saving clause of § 216 (j) must be read in light of the judicial decisions interpreting Part I of the Interstate Commerce Act before 1935, for the course of those decisions illuminates the significance of the striking differences which Congress saw fit to make between the provisions of Part I and those of the Motor Carrier Act. The landmark case is *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426. There a shipper sued in a state court to recover the difference between an allegedly unreasonable charge exacted from it by a rail carrier pursuant to tariffs filed by the carrier with the I. C. C. and

[12] Such a right was assumed by this Court to have existed at common law in *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 436, and *Arizona Grocery Co.* v. *Atchison, T. & S. F. R. Co.*, 284 U. S. 370. But see Aitchison, Fair Reward and Just Compensation, Common Carrier Service, p. 10, suggesting that the common-law right is one to be free from undue discrimination, rather than from mere exorbitance.

what was claimed would have been a just and reasonable charge. One of the issues before this Court was whether any common-law right to recover an exorbitant common carrier frieght charge paid under protest survived the passage of the Interstate Commerce Act. The Court held, despite the existence in Part I of a saving clause much broader in scope than that here involved,[13] that because under the statutory scheme only the I. C. C. could decide in the first instance whether any filed rate was "unreasonable" either as to the past or future, any common-law right was necessarily extinguished as "absolutely inconsistent" with recognition of the Commission's primary jurisdiction. It is important to note that this conclusion did not rest upon the fact that under Part I the I. C. C. had reparations authority with respect to unreasonable charges paid by shippers, but instead was evidently dictated by the broader conclusion that the crucial question of reasonableness could not be decided by the courts.

Since the Government concedes that under Part II, as under Part I, the issue of the unreasonableness of rates cannot be adjudicated in the courts, it would seem to follow that the common-law right which the Government urges as surviving under § 216 (j) cannot in fact survive, since that clause preserves only "any remedy or right of action not inconsistent" with the statutory scheme. The Government urges, however, that there is nothing actually inconsistent with the Commission's primary jurisdiction

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[13] Section 22 of the Interstate Commerce Act provided at the time of the *Abilene* case, and continues in substance to provide, that: "Nothing in this act contained in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies."

in recognizing the survival of a common-law right, because the demands of primary jurisdiction can be satisfied by referral of the question of the reasonableness of the assailed rate to the I. C. C., and that although the Commission concededly has no independent authority to entertain and adjudicate a claim for reparations, it nevertheless should be permitted in effect to exercise such an authority as an adjunct to a judicial proceeding.

The question is, of course, one of statutory intent. We do not think that Congress, which we cannot assume was unaware of the holding of the *Abilene* case that a common-law right of action to recover unreasonable common carrier charges is incompatible with a statutory scheme in which the courts have no authority to adjudicate the primary question in issue, intended by the saving clause of § 216 (j) to sanction a procedure such as that here proposed. It would be anomalous to hold that Congress intended that the sole effect of the omission of reparations provisions in the Motor Carrier Act would be to require the shipper in effect to bring two lawsuits instead of one, with the parties required to file their complaint and answer in a court of competent jurisdiction and then immediately proceed to the I. C. C. to litigate what would ordinarily be the sole controverted issue in the suit. No convincing reason has been suggested to us why Congress would have wished to omit a direct reparations procedure, as it has concededly here done, and yet leave open to the shipper the circuitous route contended for.

To permit a utilization of the procedure here sought by the Government would be to engage in the very "improvisation" against which this Court cautioned in *Montana-*

Dakota, supra, in order to permit the I. C. C. to accomplish indirectly what Congress has not chosen to give it the authority to accomplish directly. In the absence of the clearest indication that Congress intended that the Motor Carrier Act should preserve rights which could be vindicated only by such an improvisation, we must decline to consider a defense which "involves only issues which a federal court cannot decide and can only refer to a body which also would have no independent jurisdiction to decide . . ."[14] *Montana-Dakota, supra,* at p. 255. The Government's reliance upon *United States* v. *Western Pacific R. Co.,* 352 U. S. 59, is misplaced, for in that case involving Part I of the Interstate Commerce Act, the authority of the I. C. C. to determine the reasonableness of past filed rates in aid of court litigation was undoubted. The case decided no more than that referral to the I. C. C. of the issue of "unreasonableness" involved in the shipper's defense to the carrier's timely Tucker Act suit was not foreclosed by the fact that affirmative reparations relief before the Commission would have been

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[14] It is noteworthy that in 1949, when Congress added to the Motor Carrier Act a statute of limitations provision governing suits by and against carriers involving charges, such provision was made applicable only to suits for "overcharges," defined to mean "charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the Commission." 49 U. S. C. § 304a. It would be surprising, given the policy of uniformity reflected in this provision, for Congress not to have also added a statute of limitations provision applicable to suits on account of unreasonable rates, had a cause of action with respect to such rates been deemed to exist. Compare 49 U. S. C. § 16 (3)(b), providing a limitations provision for complaints for the recovery of damages "not based on overcharges" from rail carriers.

barred by limitations. It has no bearing on the question whether a judicial remedy in respect of allegedly unreasonable past rates survived the passage of the Motor Carrier Act.

It is pointed out that the I. C. C. has long claimed the authority to make findings as to the reasonableness of past motor carrier rates embodied in tariffs duly filed with the Commission. It is true that in a series of cases beginning with *Barrows Porcelain Enamel Co.* v. *Cushman Motor Delivery Co.*, 11 M. C. C. 365, decided in 1939, divisions of the Commission, and eventually the Commission itself, *Bell Potato Chip Co.* v. *Aberdeen Truck Line*, 43 M. C. C. 337, announced that the I. C. C. possessed such authority. But in these cases the anterior question now before us, whether a shipper has a right, derived from outside the statute, to put the question of the reasonableness of past rates in issue in judicial proceedings, was given only cursory consideration or else wholly ignored.[15] The cases devoted themselves to searching out authorization in the Act for I. C. C. participation, by adjudication as to past unreasonableness, in the vindi-

[15] See, *e.g.*, *United States* v. *Davidson Transfer & Storage Co., Inc.*, 302 I. C. C. 87, 90-91, involving the same parties as those now before us in No. 96. *Barrows*, relied on heavily in the dissenting opinion because it was decided by a Division of the I. C. C. of which Commissioner Eastman, previously Federal Coordinator of Transportation and a principal architect of the Motor Carrier Act, was a member, does not even suggest that a common-law action to recover unreasonable rates might be maintainable. Rather it referred to findings as to the reasonableness of past rates only as "valuable future guides to shippers and carriers." 11 M. C. C., at 367.

cation of whatever reparation right must exist.[16] The Government is able to point to only two cases in addition to the present ones, in the 24 years since passage of the Motor Carrier Act, in which courts have appeared to assume that the issue of reasonableness of past motor carrier rates was litigable,[17] and in neither of these cases was the question given other than the most cursory attention. Under these circumstances the issue before us cannot fairly be said to be foreclosed by long-standing interpretation and understanding.

We are told that Congress has long been aware that the Commission was of the view that a common-law action for recovery of unreasonable rates paid to a motor carrier, with referral to the Commission of the issue of unreasonableness, would lie, and that its failure to legislate in derogation of this view implies an approval and acceptance of it. But it appears that each time the Commission's views in this regard were communicated to committees of Congress, it was in connection with a request by the Commission for legislation which would have given to shippers a cause of action under the statute and granted to the Commission the authority to award

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[16] The *Bell* case purported to find such authorization in §§ 216 (e) and 204 (c) (49 U. S. C. §§ 316 (e), 304 (c), although both these provisions appear in terms directed only to the authorization of findings and orders operating solely prospectively. It relied also on the provisions of the statute which impose on the carrier the duty of maintaining reasonable and nondiscriminatory rates. 49 U. S. C. § 316 (b), (d). But see *Montana-Dakota Utilities Co.* v. *Northwestern Pub. Serv. Co.*, *supra*.

[17] *New York & New Brunswick Auto Express Co.* v. *United States*, 130 Ct. Cl. 339, 126 F. Supp. 245; *United States* v. *Garner*, 134 F. Supp. 16 (D. C. E. D. N. C.).

reparations, and each time that request was rejected.[18] Had Congress being asked legislatively to overrule the

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[18] See notes 10, 11, *supra*.

It is suggested that Congress was fully informed at the time of passage of the Transportation Act of 1940 of "an existing interpretation" of the Motor Carrier Act which would allow common-law actions for the recovery of unreasonable rates. We do not so read the legislative history relied upon. On the contrary, Commissioner Eastman, testifying before the Senate Committee, appeared to distinguish between the availability of a judicial remedy in respect of inapplicable tariff rates and the unavailability of such a remedy in respect of rates claimed to be "unreasonable" though embodied in a filed tariff. The Commissioner said:

"So far as reparation is concerned, there is no reason why these provisions should not be applied to motor carriers as well as to railroads. They were omitted from the Motor Carrier Act only because of the desire to lighten the burdens of the motor carriers in the early stages of regulation, in the absence of any strong indication of public need. Motor carriers have practically no traffic which is noncompetive, and there is little danger that they will exact exorbitant charges. Since the Motor Carrier Act became effective in 1935, the Commission has not once had occasion to condemn motor-carrier rates as unreasonably high. I don't think we have had any complaints to that effect. It follows that there is nothing to indicate that shippers need provisions to enable the Commission to award reparation for damages suffered because of unreasonable charges.

"The occasion for reparation from motor carriers would chiefly arise, therefore, in the event of overcharges above published tariff rates. Shippers can recover *such overcharges* in court as the law now stands." (Emphasis added.) Hearings before Senate Interstate Commerce Committee on S. 1310, S. 2016, S. 1869, and S. 2009, 76th Cong., 1st Sess., pp. 791-792.

(*Footnote continued on following page*)

doctrines enunciated in *Bell Potato Chip, supra,* and declined to do so, that fact would no doubt have been entitled to some weight in our interpretation of the Act. But we do not think that from the failure of Congress to grant a new authority any reliable inference can permissibly be drawn to the effect that any authority previously claimed was recognized and confirmed.

Finally, it is contended that denial of a remedy to the shipper who has paid unreasonable rates is to sanction injustice.[19] The fact that during the 24-year history of the Motor Carrier Act shippers have sought to secure adjudications in the I. C. C. as to the reasonableness of past rates on only a handful of occasions, despite the

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(*Footnote continued from preceding page*)

See also Hearings at p. 132, where Senator Reed asked a truckers' representative opposing the addition of reparations provisions to the Motor Carrier Act "[I]f a shipper by railroad, which is one form of common carrier, now has a remedy at law in the way of damages which he may have suffered through a collection of an unreasonable rate, and if we are trying to make uniform regulations, why should a common carrier by truck be exempted from the right or remedy of the shipper against an unreasonable charge any more than any other form of common carrier?" The reparations provision was subsequently stricken from the bill.

[19] But see Jaffé, Primary Jurisdiction Reconsidered, 102 U. of Pa. L. Rev. 577, 589, commenting on *Bell Potato Chip, supra*: "It is, to be sure, doubtful that reparations in such a case serve a useful function. Rates are under continuous scrutiny. Administrative condemnation implies new circumstances or new understanding rather than serious past injustice. And, as Mr. Justice Jackson observes in the *Montana-Dakota* case, the overcharge has usually been passed along by the one who paid it to some undiscoverable and unreimbursable consumer."

Commission's invitation to shippers to pursue that course in the line of cases culminating in *Bell Potato Chip, supra*, strongly suggests that few occasions have arisen where the application of filed rates has aggrieved shippers by motor carrier.[20] Furthermore, this contention overlooks the fact that Congress has in the Motor Carrier Act apparently sought to strike a balance between the interests of the shipper and those of the carrier, and that the statute cut significantly into pre-existing rights of the carrier to set his own rates and put them into immediate effect, at least so long as they were within the "zone of reasonableness." Under the Act a trucker can raise its rates only on 30 days' prior notice, and the I. C. C. may on its own initiative or on complaint, suspend the effectiveness of the proposed rate for an additional seven months while its reasonableness is scrutinized.[21] Even if the new rate is eventually determined to be reasonable, the carrier concededly has no avenue whereby to collect the increment of that rate over the previous one for the notice or suspension period. Thus although under the

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[20] It was recognized at the time of passage of the Motor Carrier Act that competitive conditions in the trucking industry were such that the possibility of unreasonably high rates presented no problem. Commissioner Eastman, who had conducted an inquiry into the motor carrier industry, stated during the hearings preceding passage of the Act that "I do not recall that there were any complaints based upon excessive charges." Hearings before a Subcommittee of the House Committee on Interstate and Foreign Commerce on H. R. 5262, 6016, 74th Cong., 1st Sess., p. 32. See also his 1939 statement before the Interstate Commerce Committee of the Senate, quoted at note 18, *supra*.

[21] See Motor Carrier Act, §§ 217 (c), 216 (g), 49 U. S. C. §§ 317(c), 316 (g).

statutory scheme it is possible that a shipper will for a time be forced to pay a rate which he has challenged and which is eventually determined to be unreasonable as to the future, as when the suspension period expires before the I. C. C. has acted on the challenge, it is ordinarily the carrier, rather than the shipper which is made to suffer by any period of administrative "lag."[22]

For the foregoing reasons the judgment of the Court of Appeals in each of these cases must fall.

Reversed.

MR. JUSTICE BLACK, with whom THE CHIEF JUSTICE, MR. JUSTICE DOUGLAS and MR. JUSTICE CLARK join, dissenting.

There can be no serious doubt that at common law a cause of action existed against carriers who charged unreasonable rates. See *Texas & P. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 436; *Arizona Grocery Co.* v. *Atchison, T. & S. F. R. Co.*, 284 U. S. 370, 383.[1] Nor can it be questioned that the Motor Carrier Act confirmed the common-law policy against unreasonable rates

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[22] Counsel for the Government stated on oral argument that the situation presented in No. 96, where the suspension period expired before the adjudication of the reasonableness of the challenged rate had been completed, arises very infrequently, since the suspension period is ordinarily ample to permit such adjudication.

[1] The exaction of unreasonable rates by a public carrier was forbidden by the common law. . . . The public policy which underlay this rule could . . . be vindicated . . . in an action brought by him who paid the excessive charge, to recover damages thus sustained." 284 U. S., at 383.

and in fact expressly made such rates illegal.[2] It is also clear that the Act attempted to preserve all pre-existing remedies which did not directly conflict with its aims.[3] Nevertheless the Court today holds that the statute abolished the common-law remedy by implication and left shippers helpless against carriers who have charged unreasonable and therefore illegal rates. To accomplish this result the Court relies essentially on two prior decisions of this Court; *Montana-Dakota Utilities Co.* v. *Northwestern Pub. Serv. Co.*, 341 U. S. 246, which I believe has virtually nothing to do with the issue, and *Texas & P. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, which, I think, supports a holding opposite to that which the Court makes today. Moreover in reaching its conclusion, the Court overturns a long-standing and consistent I. C. C. interpretation of the Motor Carrier Act—an interpretation which was based in large part on the *Abilene* case, which was first formulated by men who helped draft the Act, and which has been generally accepted by shippers, carriers, and Congress alike. I am unable to understand why the Court strains so hard to reach so bad a result.

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[2] 49 Stat. 543, as amended, 49 U. S. C. §§ 301-327. Section 216 (d) of the Act, as amended, 49 U. S. C. § 316 (d), reads in part: "All charges made for any service rendered or to be rendered by any common carrier by motor vehicle engaged in interstate or foreign commerce in the transportation of passengers or property . . . shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof, is prohibited and declared to be unlawful." See also § 216 (b), 49 U. S. C. § 316 (b).

[3] Section 216 (j), 49 U. S. C. § 316 (j) states "Nothing in this section shall be held to extinguish any remedy or right of action not inconsistent herewith."

Appendix C

The Motor Carrier Act, though largely patterned after the Interstate Commerce Act of 1887 regulating railroads, had no counterpart of §§ 8, 9, 13 and 16 of that Act.[4] These sections provided two remedies either of which a shipper could pursue to recover damages suffered as a result of unlawful carrier rates or practices. One remedy was by complaint to the Commission the other by suit brought in an appropriate District Court of the United States. Both these remedies authorized imposition of reasonable attorneys' fees on a carrier should a claim reach the court and be decided in the shipper's favor. See *Meeker* v. *Lehigh Valley R. Co.*, 236 U. S. 412, 432-433.

In *Texas & P. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, this Court considered the effect of these reparation sections on common-law actions by shippers for damages caused by rates alleged to be unlawful because unreasonable. The Court implied that the state court in which the shipper had sued had no jurisdiction since the congressional remedies in the reparation sections were complete and exclusive in themselves and supplanted the pre-existing common-law right of shippers to sue for damages caused by unreasonable rates, this right being deemed inconsistent with the statutory remedies; and held that the power to determine the reasonableness of rates was primarily and exclusively vested by the Act in the Commission. It did not hold, as the Court now assumes, that the existence of primary jurisdiction alone destroyed all court remedies. Accordingly, since the *Abilene* case, when the question of unreasonableness has arisen in court proceedings courts have often refused to

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[4] See 24 Stat. 382-384, as amended, 49 U. S. C. §§ 8, 9, 13, 16.

dismiss the cause but have stayed the action pending I. C. C. determination of that issue. See, *e.g.*, *Mitchell Coal & Coke Co.* v. *Pennsylvania R. Co.*, 230 U. S. 247; *General Am. Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422, 432-433; *United States* v. *Western P. R. Co.*, 352 U. S. 59, 62-70.[5] The Court today seems to decide instead that primary jurisdiction is inconsistent with court remedies of any kind, and that the mere omission of reparations provisions in the Motor Carrier Act showed a congressional purpose to deprive shippers of the common-law right to obtain damages resulting from unreasonable rates. It reaches this conclusion although to do so leaves shippers with no remedy at all however unreasonable and unlawful a past rate may have been, and although there is not a word in the Act and nothing to which we have been directed in its history, that shows any congressional purpose to take away the pre-existing remedy.

On the contrary, since passage of the Motor Carrier Act in 1935, a steady line of decisions by the I. C. C. has interpreted that Act as leaving shippers the right to sue in the courts for damages resulting from unlawful rates. This action lay only where the rates had not previously been held reasonable by the Commission, cf. *Arizona Grocery Co.* v. *Atchison, T. & S. F. R. Co.*, 284 U. S. 370, 387-388, and consisted of two parts, (1) a suit by

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[5] Conversely many instances have been cited of shippers seeking only a determination of the reasonableness of a past practice from the I. C. C. and reserving their rights to obtain damages later in the courts. See generally the discussion of this problem in *United States* v. *Interstate Commerce Comm'n*, 337 U. S. 426, 464-466 (dissenting opinion). See also *United States* v. *Interstate Commerce Comm'n*, 337 U. S. 426 (opinion of the Court).

a shipper in a court, (2) a determination by the Commission that the rates sued on had, in fact, been unreasonable or otherwise unlawful when charged. The first case of this kind, *Barrows Porcelain Enam. Co.* v. *Cushman Moto Deliv. Co.*, 11 M. C. C. 365, was submitted to the Commission in April 1938, and handed down in February 1939. It was decided by Division 5 which was specially charged with the administration of the Motor Carrier Act and was concured in by Commissioner Eastman who had by then served on the Commission or as Coordinator of the Transportation System of the country for 17 years. He had drafted the 1935 Act and probably knew more about what it meant than anybody on this Court then or now.[6] Admitting that the Commission could not itself award reparations, Division 5 held, in *Barrows*, that it did have authority to pass on the reasonableness of past rates since unreasonable rates were unlawful under the Act. Significantly Division 5 stated, "This conclusion is, we believe supported by the reasoning of the United States Supreme Court in *Texas & P. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426." 11 M. C. C., at 367. *Barrows* was reaffirmed in early 1940 with Commissioner Eastman again on the panel.[7]

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[6] See Hearings, Senate Committee on Interstate Commerce on S. 1310, S. 2016, S. 1869, S. 2009, 76th Cong., 1st Sess. 756-757, 762, 785.

[7] *Dixie Mercerizing Co.* v. *ET & WNC Motor Transp. Co.*, 21 M. C. C. 491. The Court suggests that this line of cases gave only cursory treatment to the question of whether a court remedy existed. But in *Bell Potato Chip Co.* v. *Aberdeen Truck Line*, 43 M. C. C. 337, 341-343, the I. C. C. stated in part:

(Footnote continued on following page)

Appendix C

In September 1940, after very extensive hearings, the Interstate Commerce Act was amended and broadened in many respects.[8] At the same time, water carriers were brought under Commission regulation. To achieve uniformity between the different parts of the Act, efforts were made to subject motor carriers to reparation pro-

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(Footnote continued from preceding page)

"To hold that a motor carrier which has violated any of these prescribed duties is immune to civil liability to one injured thereby while rail and water carriers similarly offending must respond in damages, would be not only at variance with the fundamental rule of *ubi jus ibi remedium* but would also disregard the provisions of sections 216 (j), 217 (b), and 22, which preserve all common-law and statutory remedies. The statute, by declaring unlawful and prohibiting unreasonable and discriminatory rates, has superseded the common-law right but has not abrogated remedies heretofore recognized. See *Texas & P. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Mitchell Coal & Coke Co.* v. *Pennsylvania R. Co.*, 230 U. S. 247, 258. . . .

"How, then is a shipper who has been injured by the exaction of an unlawful motor-carrier rate to obtain redress against an unwilling carrier? The answer is, in the courts. . . .

". . . In this connection, it may be noted that it is a recognized practice to hold in abeyance court proceedings pending the determination by the Commission of administrative questions. *Eastern-Central Motor Carriers Assn.* v. *United States*, 321 U. S. 194; *General American Tank Car Corp.* v. *El Dorado Term. Co.*, 308 U. S. 422; *Mitchell Coal & Coke* v. *Pennsylvania R. Co.*, *supra*; *Morrisdale Coal Co.* v. *Pennsylvania R. Co.*, 230 U. S. 304, 314; *Southern Ry. Co.* v. *Tift*, 206 U. S. 428, 434."

[8] 54 Stat. 898.

ceedings before the Commission.[9] The representative of the motor carriers strenuously objected. The hearings before the Senate Committee on Interstate Commerce show that the objections were directed against subjection of motor carriers to *Commission* reparations not to common-law actions in the *courts*. Commission actions, it was stated, might result in the taxing of attorneys' fees in addition to damages and might thereby encourage "claim chasers."[10] The Committee members and the witnesses before Congress all appeared to recognize that suits could be filed in court. Thus the Chairman of the Committee stated "He has that right now. It does not add anything, as a matter of fact, to the rights of the shipper. . . . [I]f you were afraid that the railroad might go and stir up a claim against [the truckers], they can do that now."[11] And the representative of the truckers answered "We are not fearful of that, but we are fearful of practices occurring where [the truckers] will be constantly harassed." To which a member of the Committee added "The objection is that under the existing law you have to go to the court to get relief and under the proposed law the Interstate Commerce Commission could give you relief?"[12] Commissioner Eastman also appeared before the Committee, two months after the *Barrows* opinion came down, and stated

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[9] See, *e. g.*, statement of Senator Reed, Hearings Senate Committee on Interstate and Foreign Commerce on S. 1310, S. 2016, S. 1869, S. 2009, 76th Cong., 1st Sess. 132.

[10] *Id.*, at 129-133.

[11] *Id.*, at 130.

[12] *Ibid.*

Appendix C

"[M]otor carrier tariffs have been, by and large, very imperfect products, and while the situation is improving continually, much room for improvement remains.

"Where tariffs are poorly worded and imperfectly constructed, experienced traffic experts can often raise troublesome questions as to the applicability of the rates charged, and there are those who make this their business, obtaining their compensation from such reparation awards as they are successful in securing.

"In the early stages of their regulation and tariff development, it was thought that the motor carriers might well be spared the burden of defending such claims before the Commission."[13]

Accordingly the Committee Report on the 1940 Act stated that the paragraph of the bill which would have subjected the motor carriers to reparation claims before the Commission was changed

"because of motor carrier objections to awards of reparation *by the Commission*. Shippers *have the right to recover in court* any damages *resulting from violations of the law by motor carriers* or carriers by water." S. Rep. No. 433, 76th Cong., 1st Sess. 18. (Emphasis supplied.)[14]

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[13] *Id.*, at 792.

[14] The statute expressly declares unreasonable rates unlawful. See note 2, *supra*. *Barrows Porcelain Enam. Co. v. Cushman Motor Deliv. Co.*, 11 M. C. C. 365, confirmed this fact as to past unreasonable rates.

It seems clear, therefore, that when the 1940 Motor Carrier Act was adopted, at least the Senate Committee was fully informed of an existing interpretation of the 1935 Act under which shippers could sue for damages on the basis of unreasonable rates.

After the passage of the 1940 Act, Divisions of the Commission continued to construe the Motor Carrier law to allow determinations of the reasonableness of past rates. In 1942, for example, the Commission did this in a case involving the same question presented by the Government in T. I. M. E., No. 68—the reasonableness of a joint through rate which exceeds the aggregate of intermediate rates between the same points. The Commission held that on the facts presented the rates "were unreasonable . . : to the extent that they exceeded the corresponding aggregate. . . ." *Kingan & Co.*, v. *Olson Trans. Co.*, 32 M. C. C. 10, 12. Finally in *Bell Potato Chip Co.* v. *Aberdeen Truck Line*, 43 M. C. C. 337, the whole Commission reviewed the question to provide a "precedent for future guidance" and emphatically approved the *Burrows* line of cases. It established safeguards against frivolous or moot complaints but reaffirmed the existence of court remedies for unreasonable rates and the need for Commission determinations of the fact of unreasonableness before the courts could award damages.

Both the *Bell* case and the *Barrows* case have been cited to Congressional Committees time and again. In 1947 and 1948 extended hearings were held before Senate and House Committees on bills to establish uniform statutes of limitations for court actions arising out of violations of the Commerce Act and to subject motor carriers and freight forwarders to Commission repara-

tions.[15] Members of the I.C.C. in written statements, briefs and testimony, stressed to the Committees considering the bills both the existence of the court remedies described in the *Bell* case and the fact that few common-law actions were in fact undertaken because of the expense involved in a split procedure.[16] Witnesses for and against the bills accepted the rule of the *Bell* case.[17] Thus the representatives of the freight forwarders, whose status under the Act is the same as that of motor carriers, referring to the *Bell* case said "It is the law today," and then added "If the Commission finds that the rates have been unreasonable in the past, damages may be obtained under the law as it stands today."[18] He opposed the proposed change because he felt that it would make it easier for shippers to obtain reparations where no damages were actually suffered.[19] When the bills were reported by the Committees the provisions for reparations before the Commission were excluded. The report of the

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[15] See Hearings, House Committee on Interstate and Foreign Commerce on H. R. 2324, H. R. 2295, 80th Cong., 1st Sess.; Hearings, Senate Subcommittee of the Committee on Interstate and Foreign Commerce on S. 571-H. R. 2759, S. 935, S. 1194, S. 290-2426, 80th Cong., 2d Sess.

[16] Hearings, House Committee, *supra*, n. 15, at 5-6; Hearings, Senate Subcommittee, *supra*, n. 15, at 8-16.

[17] See, *e. g.*, Hearings, House Committee, *supra*, n. 15, at 41-47, 82.

[18] *Id.*, at 41, 42.

[19] *Id.*, at 42-47.

House Committee explained that reparations before the Commission were not available under the law as it stood. After stating that the bills originally had included reparation provisions before the Commission similar to those applied to rail carriers and that these had been dropped, the report incorporated a letter from the I.C.C. explaining the existence of the court remedy and pointing out the weaknesses of this remedy. The Committee then stated that legislation making additional reparations provisions applicable to motor carriers and freight forwarders was not at that time deemed desirable. It concluded that the other provisions, including a uniform statute of limitations in cases arising from the charging of tariffs different from those on file, should be enacted.[20] While Congress did not enact these measures before adjournment,[21] they were passed in the following Congress after Committee Reports which referred to the hearings of the prior two years.[22]

Once more, as late as 1957, after this Court's decision in *Montana-Dakota Utilities Co.* v. *Northwestern Pub. Serv. Co.*, 341 U. S. 246, the I. C. C. sought to have reparations before the Commission established. Again hearings were held; in these the Chairman of the I. C. C., the Under Secretary of Commerce, a representative of the freight

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[20] H. R. Rep. No. 208, 80th Cong., 1st Sess. 3, 4.

[21] The bill passed the House of Representatives but the Senate did not debate it before adjournment. See H. R. Rep. No. 766, 81st Cong., 1st Sess. 1; S. Rep. No. 83, 81st Cong., 1st Sess. 2.

[22] 63 Stat. 280. See H. R. Rep. No. 766, 81st Cong., 1st Sess.; S. Rep. No. 83, 81st Cong., 1st Sess.

forwarders and others unequivocally testified that a remedy for unreasonable past rates was available through the courts.[23] The testimony by the representatives of the freight forwarders caused the presiding member of the Subcommittee to ask "What does this bill propose that is different from what we now have? That is what I am trying to determine." To which the representative, opposing Commission *reparations*, replied: "It just adds some cumbersome machinery that we think will cause litigation."[24]

This Court has frequently had occasion to say that interpretations of statutes by agencies charged with their administration are entitled to very great weight.[25] Moreover, the legislative history of bills attempting to grant the I. C. C. power to award reparations goes far, in view of the arguments made against them, toward approving the original interpretation of the Motor Carrier Act made by Division 5 of the I. C. C. and Commissioner Eastman. Recently, the Commission has reaffirmed its interpretation which has stood for more than 20 years.[26] Against

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[23] Hearings, Senate Subcommittee of Committee on Interstate and Foreign Commerce on S. 377, S. 378, S. 937, S. 939, S. 943, 85th Cong., 1st Sess. 3, 12, 49, 116-117, 137.

[24] *Id.*, at 1, 117.

[25] See, *e. g.*, *Fawcus Machine Co.* v. *United States*, 282 U. S. 375, 378; *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140; cf. *Cammarano* v. *United States*, 358 U. S. 498.

[26] *United States* v. *Davidson Transfer & Storage Co.*, 302 I. C. C. 87.

reaffirmance a dissent was written based on the belief that this Court's holding in *Montana-Dakota Utilities Co.* v. *Northwestern Pub. Serv. Co.*, 341 U. S. 246, required a new interpretation. The Court seems to stress the same contention here. Quite apart from the fact that the question actually up for decision in *Montana-Dakota* was whether the Federal Power Act *created a federal* cause of action and not whether it *destroyed common-law* rights, I believe that there are important differences between the Power Act and the Motor Carrier Act which make the *Montana-Dakota* case wholly inapplicable here.

Admittedly *Montana-Dakota* and the statute it interpreted have some similarities to these cases and this statute. But unlike the Carrier Act the provisions of the Power Act under consideration in *Montana-Dakota* regulated wholesale rates, that is rates charged purchasers for resale, not rates charged retail customers.[27] The purpose of that Act was, nevertheless, to benefit consumers by holding down wholesale prices. Wholesalers whose purchase price was reduced prospectively could pass the reduction on to their customers, the consumers. In *Montana-Dakota* the Court indicated that the consumers would not be helped by *ex post facto* determinations of unreasonableness resulting in a refund to wholesalers. 341 U. S., at 254. The facts of the case lent themselves to such a finding. Damages were asked for a back period of many years; consumers had long since paid their rates on the basis of the unreasonable prices charged the wholesalers; and there was no reason to believe that any consumers who benefited from whatever lower prices the refund might allow would be the same ones who had paid

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[27] 41 Stat. 1063, as amended, 16 U. S. C. §§ 791a-825r.

the excessive rates. The Federal Power Commission, in an *amicus* brief, stressed these facts and argued that any refund would likely be a windfall providing an unjust enrichment to the wholesaler. Citing this brief the Court accepted the F. P. C. argument, 341 U. S., at 254, n. 11, over a vigorous dissent which indicated that perhaps ways of refunding the excess to consumers might be found. 341 U. S., at 265, 266. No similar problem exists under the Motor Carrier Act. The relevant sections were in large measure designed to protect shippers,[28] and in fact the shippers are, in many instances, the ultimate parties on whom the burden falls. Both these cases are, of course, such instances. And even when the shippers are not necessarily the ultimate parties, the economics of the industry is such that windfalls to them are unlikely.

Similarly, other reasons which induced this Court's holding in *Montana-Dakota* are inapplicable here. In refusing to include the Power Act provisions authorizing wholesalers to seek reparations before the Federal Power Commission, the Senate Committee which reported the bill said, "They are appropriate sections for a State utility law, but the committee does not consider them applicable to one governing merely wholesale transactions."[29] This report, unlike any in the Motor Carrier Act, is easily understood when read in the light of evidence presented to the Committee considering the Power Act. The reparation provisions of that Act were opposed

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[28] See testimony of Commissioner Eastman in Hearings, Senate Subcommittee on Interstate and Foreign Commerce on S. 1310, S. 2016, S. 1869, S. 2009, 76th Cong., 1st Sess. 792.

[29] S. Rep. No. 621, 74th Cong., 1st Sess. 20.

by the National Association of Railroad and Utilities Commissioners, whose General Solicitor told the Committee:

> "That is an entirely proper provision in a railroad statute. When a man goes to the railroad station with a load of goods to ship somewhere he has to ship at the rate that is fixed in the tariff. He must make the shipment then; and he ought to be able to come thereafter to the Commission and show that he was required to pay an unreasonable rate, if it was unreasonable, and to ask for a determination of a reasonable rate and get reparation that is due him for any overpayment. That is perfectly proper. But this bill relates only to service *between the wholesale generating or producing company and the distributing utility.* We question whether the *public interest will be served by giving any company the right to go ahead receiving service at the established rate for 2 years, and then to bring a complaint before the Federal Commission that the rate has been unreasonable.*"[30]

The testimony was emphasized as shown above, in the briefs in *Montana-Dakota.*[31] Doubtless this history led the minority as well as the majority in that case to the view that "Congress did not intend either court or Commission to have the power to award reparations on the

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[30] Hearings, House Committee on Interstate and Foreign Commerce on H. R. 5423, 74th Cong., 1st Sess. 1685.

[31] See Brief of Respondent Northwestern Pub. Serv. Co., pp. 25-26, Brief of the Federal Power Commission as *amicus curiae*, p. 18.

ground that a properly filed rate or charge has in fact been unreasonably high or low." 341 U. S., at 258. Since the history of the Motor Carrier Act points in the opposite direction there is no reason to apply the *Montana-Dakota* case to the Motor Carrier Act.

Moreover, if motor carrier shippers are deprived of court actions to recover for unreasonable rates, they are placed in a much worse position than wholesale power purchasers. 16 U. S. C. § 824d (e) authorizes the Power Commission to suspend rates for five months and, if a hearing on those rates is not concluded by that time, to order the power company to keep an accurate account of the amount and source of all money received. Should the rates be found unreasonable, the Commission can order the excess refunded with interest. The Motor Carrier Act, on the other hand, while authorizing suspension of rates, has no provision for refunds if hearings are not completed when the suspension expires. § 216 (g), 49 U. S. C. § 316 (g). Had there been such a provision in the Carrier Act the Government would have been fully protected from the rates charged in the *Davidson* case, No. 96.

The Power Act and the Motor Carrier Act are quite different in language, scope, purpose and meaning. The Court in *Montana-Dakota* carefully limited its holding to the Power act, *e.g.*, 341 U. S., at 254. The arguments advanced in that context for the conclusive effect of power rates once filed are wholly inapplicable to rates under the Motor Carrier Act. In these Motor Carrier cases we have 20 years of Commission interpretation, in part by men who helped write the Act and who administered it from the time it first went into effect to help us in decid-

ing the question. Congress passed the 1940 revision of the Motor Carrier Act, apparently with full knowledge of the Commission rulings which indicated that shippers could challenge, in the courts, carrier-fixed rates so long as these rates had not been expressly held reasonable by the Commission. Cf. *Arizona Grocery Co.* v. *Atchison, T. & S. F. R. Co.*, 284 U. S. 370. The changes made in 1949, and those not made in 1957, again indicate a reliance on the Commission's interpretation. I believe that interpretation should govern here, and therefore would affirm the judgments of the Courts of Appeals in both these cases.

Appendix C

DECISION IN MONTANA-DAKOTA UTILITIES CO. v. WESTERN PUBLIC SERVICE CO.—341 U. S. 246 (Eighth Circuit) OCTOBER TERM, 1950.

MONTANA-DAKOTA UTILITIES CO.

v.

NORTHWESTERN PUBLIC SERVICE CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 77.—Argued November 27, 1950.—Decided May 7, 1951.

Petitioner and respondent are public utility electric companies engaged in interstate commerce and subject to the Federal Power Act. For ten years, while under the same management through interlocking directorates and joint officers with the approval of the Federal Power Commission, petitioner's predecessor and respondent interchanged electric energy, shared expenses and made a number of intercompany contracts establishing rates and charges which were filed with and accepted by the Commission. After separation of their management, petitioner sued in federal district court to recoup losses alleged to have resulted from its predecessor paying respondent unreasonably high charges for what re-

spondent furnished it and receiving unreasonably low rates for what it furnished respondent. It alleged that these rates and charges were fraudulent and unlawful and were due to the interlocking directorates, which prevented protest to the Commission to have reasonable rates and charges established pursuant to the provisions of the Federal Power Act. There was no diversity of citizenship of the parties; and federal jurisdiction was asserted solely on the ground that the case arose under the Federal Power Act. *Held*:

1. Since the complaint asserted a cause of action under the Federal Power Act, the District Court had jurisdiction to determine whether it stated a cause of action maintainable in a federal court and, if so, whether it was sustained on the facts. P. 249.

2. The complaint stated no cause of action maintainable in a federal court. Pp. 249-255.

(a) Under the Federal Power Act, the right to a reasonable rate is the right to the rate which the Commission files or fixes; and, except for review of the Commission's orders, a court can assume no right to a different rate on the ground that, in the opinion of the court, such different rate is the only reasonable rate or a more reasonable rate. Pp. 250-252.

(b) In the absence of diversity of citizenship, the allegation of fraud resulting from the interlocking relationship did not state a cause of action maintainable in a federal court. Pp. 252-253.

(c) Since the Federal Power Act does not authorize the Commission to grant reparations for

unreasonable rates collected in the past, the District Court could not properly refer the case to the Commission for determination of the reasonableness of the rates here involved. Pp. 253-254.

3. Since the case involves only issues which a federal court cannot decide and can only refer to a body which also would have no independent jurisdiction to decide them, the complaint must be dismissed. P. 255.

181 F. 2d 19, affirmed on a different ground.

In a suit alleged to be founded on the Federal Power Act, the District Court awarded petitioner a judgment for losses sustained on past rates and charges which the District Court found to be unreasonable and based on fraud. The Court of Appeals reversed on the ground that the District Court was without jurisdiction. 181 F. 2d 19. This Court granted certiorari. 340 U. S. 806. *Affirmed on a different ground*, p. 255.

William D. Mitchell argued the cause for petitioner. With him on the brief were *John C. Benson, H. F. Fellows* and *Roger L. Nordbye*.

Jacob M. Lashly argued the cause for respondent. With him on the brief were *Max Rophl, Fredric H. Stafford* and *Paul B. Rava*.

By special leave of Court, *Howard E. Wahrenbrock* argued the cause for the Federal Power Commission, as *amicus curiae*. With him on the brief were *Solicitor General Perlman, Robert L. Stern, Bradford Ross* and *Reuben Goldberg*.

MR. JUSTICE JACKSON delivered the opinion of the Court.

Appendix C

Petitioner and respondent are public electric utilities companies engaged in interstate commerce. Petitioner's predecessor and respondent were under the same management through interlocking directorships and joint officers. During that relationship the two interchanged electric energy, shared expenses, and made a number of intercompany contracts establishing rates and charges, which contracts were filed with and accepted by the Federal Power Commission. These contract rates and charges are at the root of this controversy. Petitioner charges that, during the period 1935-1945, its predecessor paid respondent unreasonably high prices for what respondent furnished it, and that it received unreasonably low rates for what it provided respondent. That advantage, it is alleged, was fraudulent and unlawful and was due to the interlocking directorate, which prevented protest to the Commission to have reasonable rates and charges established pursuant to the provisions of the Federal Power Act.[1]

Petitioner sued in United States District Court and asserted jurisdiction on the ground that the case "arises under the Constitution or laws of the United States"[2] and, more particularly, under a "law regulating commerce,"[3] specifically the Federal Power Act.

Petitioner was successful in the District Court, which found the contracts void for fraud and the rates and

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[1] 41 Stat. 1063, 49 Stat. 838, 62 Stat. 275, 16 U. S. C. §§ 791a-825r.

[2] 28 U. S. C. § 1331.

[3] 28 U. S. C. § 1337.

charges established therein unreasonable. The court also determined what would have been reasonable rates and charges for the period in question and gave judgments for the difference between its conception of reasonable charges and the actual charges, amounting to over three-quarters of a million dollars.[4]

The judgment was reversed by the Court of Appeals for the Eighth Circuit on the ground that the District Court was without jurisdiction.[5]

As frequently happens where jurisdiction depends on subject matter, the question whether jurisdiction exists has been confused with the question whether the complaint states a cause of action. The Judicial Code, in vesting jurisdiction in the District Courts, does not create causes of action, but only confers jurisdiction to adjudicate those arising from other sources which satisfy its limiting provisions. Petitioner asserted a cause of action under the Power Act. To determine whether that claim is well founded, the District Court must take jurisdiction, whether its ultimate resolution is to be in the affirmative or the negative. If the complaint raises a federal question, the mere claim confers power to decide that it has no merit, as well as to decide that it has. In the words of Mr. Justice Holmes, ". . . if the plaintiff really makes a substantial claim under an act of Congress there is jurisdiction whether the claim ultimately be held good or bad." *The Fair* v. *Kohler Die Co.*, 228 U. S. 22, 25. See also *Hurn* v. *Oursler*, 289 U. S. 238, 240.

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[4] Not reported.

[5] 181 F. 2d 19.

Even a patently frivolous complaint might be sufficient to confer power to make a final decision that it is of that nature, binding as *res judicata* on the parties.

Petitioner's complaint, in substance, alleges existence of the interlocking directorship, contends that such relationship was used fraudulently to deprive it of its federally conferred right to reasonable rates and charges, and demands reparations. We think there was power in the District Court to decide whether the claims so grounded constitute a cause of action maintainable in federal court and, if so, whether it is sustained on the facts. We think a direction to dismiss for want of jurisdiction was error and that it should not stand as a precedent.

However, it is clear that the reason underlying the Court of Appeals' decision was that no federal cause of action was established. If this was correct, we should sustain the judgment of reversal, though on other grounds than those stated.

The petitioner's problem is to avoid Scylla without being drawn into Charybdis. If its cause of action arises from fraud and deceit, it is a common-law action of which a federal court has no jurisdiction, there being no diversity in citizenship of these parties. But if it arises from being charged rates in excess of those permitted by the Power Act, it is confronted with the exclusive powers of the Commission to determine what those rates are to be. Hence, it is necessary to bring the case into court, not as a fraud action, but as one to enforce the Power Act, using the allegations of fraud to escape the limitations of the Power Commission remedies.

Appendix C

I.

Petitioner identifies as the source of its cause of action the Federal Power Act's requirement of reasonable electric utility rates,[6] which, it contends, creates its legal right to rates which a court may deem reasonable, even if different from those accepted by the Federal Power Commission. It is admitted, however, that a utility could not institute a suit in a federal court to recover a portion of past rates which it simply alleges were unreasonable. It would be out of court for failure to exhaust administrative remedies, for, at any time in the past, it could have applied for and secured a review and, perhaps, a reduction of the rates by the Commission.[7]

Petitioner gives its case a different cast by alleging that by fraudulent abuse of the interlocking relationship its predecessor was deprived of its independence and power to resort to its administrative remedy.

But the problem is whether it is open to the courts to determine what the reasonable rates during the past should have been. The petitioner, in contending that they are so empowered, and the District Court, in undertaking to exercise that power, both regard reasonableness as a justiciable legal right rather than a criterion for administrative application in determining a lawful rate.

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[6] Section 205(a) of the Act, 49 Stat. 851, 16 U. S. C. § 824d (a), states that: "All rates and charges . . . and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful."

[7] § 206 (a), 49 Stat. 852, 16 U. S. C. § 824e (a).

Appendix C

Statutory reasonableness is an abstract quality represented by an area rather than a pinpoint. It allows a substantial spread between what is unreasonable because too low and what is unreasonable because too high. To reduce the abstract concept of reasonableness to concrete expression in dollars and cents is the function of the Commission. It is not the disembodied "reasonableness" but that standard when embodied in a rate which the Commission accepts or determines that governs the rights of buyer and seller. A court may think a different level more reasonable. But the prescription of the statute is a standard for the Commission to apply and, independently of Commission action, creates no right which courts may enforce.

Petitioner cannot separate what Congress has joined together. It cannot litigate in a judicial forum its general right to a reasonable rate, ignoring the qualification that it shall be made specific only by exercise of the Commission's judgment, in which there is some considerable element of discretion. It can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms.

We hold that the right to a reasonable rate is the right to the rate which the Commission files or fixes, and that, except for review of the Commission's orders, the courts can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable one.

II.

The petitioner here contends that its case is different by reason of its allegations of fraud. Those, the evidence

that supports them, and the findings are exceedingly general, and it is not entirely clear whether, in addition to the claim that constructive fraud may be inferred from the intercorporate relationship, specific acts of deceit are found. Nor does it appear to have been thought that the difference between constructive and actual fraud mattered.

If the petitioner's grievance arises from active fraud and deceit, it gains nothing from the Federal Act. Such an action would have been maintainable if no Federal Power Act had been enacted. Before the Act, petitioner would have had no statutory right to a reasonable rate, but it did have a common-law right not to be defrauded into paying an excessive or unreasonable one. The Federal Act adds nothing to fraud as an actionable wrong, and, therefore, to find a cause of action of this character would only be to dismiss it for want of diversity.

But petitioner's case appears to have rested more heavily and perhaps entirely on constructive fraud presumed from the intercorporate relationship. The Act vests in the Commission power to authorize an interlocking directorate, which otherwise is prohibited, "upon due showing . . . that neither public nor private interests will be adversely affected thereby."[8] The relationship here concerned had received Commission approval. The effect of the approval is to exempt the relationship from the ban of the Act and remove from it any presumption of fraud that might be thought to arise from its mere existence. It would be a strange contradiction between judicial and administrative policies if a relationship which the Commission has declared will not adversely affect public or private interests were regarded by courts

[8] 305, 49 Stat. 856, 16 U. S. C. § 825d (b).

as enough to create a presumption of fraud. Perhaps, in the absence of the Commission's approval, such relationship would be sufficient to raise the presumption under state law, but it cannot do so where the federal supervising authority has expressly approved the arrangement.

We need not decide what action the Commission is empowered to take if it believes that a fraud has been committed on itself, for it has taken no action which gives rise to or affects this controversy.

III.

The entire Court is agreed that the judgment rendered by the District Court cannot stand and all agree that it cannot adjudicate the issues that plaintiff tendered to it. We disagree only as to the consequences of the disability. The majority believe the federal court should dismiss the complaint. A minority urges that we should direct the District Court to refer issues to the Federal Power Commission.

It is true that in some cases the Court has directed lower federal courts to stay their hands pending reference to an administrative body of a subsidiary question. *Smith* v. *Hoboken R. Co.*, 328 U. S. 123; *Thompson* v. *Texas Mexican R. Co.*, 328 U. S. 134; *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422. But in all those cases the plaintiff below concededly stated a federally cognizable cause of action, to which the referred issue was subsidiary. In no instance have we directed a court to retain a case in which it could not determine a single one of its vital issues. Here the issue of reasonableness of the charges is not one clearly severable from the issues of liability, for the acts charged do not amount

to fraud unless there has been an unreasonable charge. Injury is an essential element of remediable fraud. "Deceit and injury must concur." *Adams* v. *Clark*, 239 N. Y. 403, 410, 146 N. E. 642, 644 (1925). See also *Connelly* v. *Bartlett*, 286 Mass. 311, 315, 190 N. E. 799, 801 (1934).

If the court is presented with a case it can decide but some issue is within the competence of an administrative body, in an independent proceeding, to decide, comity and avoidance of conflict as well as other considerations make it proper to refer that issue. But we know of no case where the court has ordered reference of an issue which the administrative body would not itself have jurisdiction to determine in a proceeding for that purpose. The fact that the Congress withheld from the Commission power to grant reparations[9] does not require courts to entertain proceedings they cannot themselves decide in order indirectly to obtain Commission action which Congress did not allow to be taken directly. There is no indication in the Power Act that that was Congress' intent.

It is urged that this leaves petitioner without a remedy under the Power Act. We agree. In that respect, petitioner is no worse off after losing its lawsuit than its customers are if it wins. Unless we are to assume that this company failed to include its buying costs in its selling rates, we must assume that any unreasonable amounts it paid suppliers it collected from consumers. Indeed, this is the assumption made by the Commission in its brief as *amicus curiae* here.[10] It is admitted that, if it re-

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[9] S. Rep. No. 621, 74th Cong., 1st Sess. 20.

[10] Brief for Federal Power Commission, as *amicus curiae*, pp. 13-14.

coups again what it has already recouped from the public, there is no machinery in or out of court by which others who have paid unreasonable charges to it can recover.[11]

Under such circumstances, we conclude that, since the case involves only issues which a federal court cannot decide and can only refer to a body which also would have no independent jurisdiction to decide, it must decline the case forthrightly rather than resort to such improvisation.

The judgment below is affirmed upon the ground that the petitioner has not established a cause of action.

It is so ordered.

MR. JUSTICE FRANKFURTER, joined by MR. JUSTICE BLACK, MR. JUSTICE REED, and MR. JUSTICE DOUGLAS, dissenting.

The plaintiff, Montana-Dakota Utilities Company, petitioner here, is the successor in interest to several utility companies which distributed electric energy in North and South Dakota. The defendant, Northwestern Public Service Company, served the region to the south of Montana-Dakota's territory. Both corporations have been subject to the Federal Power Act since its enactment in 1935. 49 Stat. 847, 16 U. S. C. § 824 *et seq.* The controversy arises out of relations between the two enterprises prior to 1945. The facts which raise the question whether the Federal District Court had jurisdiction to entertain the suit may be briefly summarized.

After January 1, 1935, all but one of Montana-Dakota's directors were directors of Northwestern, and all of Montana-Dakota's officers were officers of the other company. These interlocking arrangements received formal author-

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[11] *Id.*, pp. 14-17.

ization by the Federal Power Commission, as required by § 305 (b) of the Act. 16 U. S. C. § 825d (b). At different times between 1935 and 1945 contracts were made between the two corporations for the sale of electric energy. All such agreements have to be filed with the Commission, § 205 (c), 16 U. S. C. § 824d (c), but the legality of rates so filed is not conditioned upon the Commission's approval. Unless they are challenged, either by an interested party or on the Commission's initiative, the filed rates become the legal rates. Montana-Dakota now claims, in essence, that for a decade Northwestern, by virtue of its control, deprived Montana-Dakota of the rights which that corporation enjoyed under the Federal Power Act and prevented it from contemporaneously asserting them before the Federal Power Commission. Montana-Dakota was prevented from filing what would have been the lawful rates because Northwestern, as the dominus of Montana-Dakota, filed rates for that company that were less than the reasonable rates to be exacted under the Federal Power Act—rates which would have been determined by arm's-length dealing between the two companies. Having secured freedom of action and thereby the power to assert its rights, Montana-Dakota brought this suit in the United States District Court for the District of South Dakota to recoup the losses which it claims were thus imposed on it.

The defendant moved to dismiss the complaint for want of jurisdiction in that it failed to state a claim under federal law. The motion was denied, 73 F. Supp. 149, and the case went to trial. The District Court found unfair dealing in the circumstances of the interlocking relationship and resulting unreasonableness in the rates, and gave

judgment for the plaintiff in the sum of $779,958.30, principal and interest.

The Court of Appeals for the Eighth Circuit reversed. It held that the Federal Power Commission "had jurisdiction and was the proper tribunal in the first instance" to determine the reasonableness of the rates and the bearing of fraud practiced on the Commission in securing permission for the interlocking arrangements and the resulting subversion of rights under the Federal Power Act. The court found that "The Commission can, no doubt, correct its own mistakes," but it did not specify the administrative remedies it deemed available. It concluded that the District Court was without power to entertain the complaint and ordered it dismissed. 181 F. 2d 19, 23. We brought the case here since important issues in the administration of the Federal Power Act are at stake. 340 U. S. 806.

Section 317 of the Federal Power Act in its present form confers on the district courts of the United States "exclusive jurisdiction of violations of this Act or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this Act or any rule, regulation, or order thereunder." 49 Stat. 862, 16 U. S. C. § 825p. There can be no doubt, therefore, that if the complaint, fairly construed in light of the successful determination of the issues, seeks to enforce a duty which the Federal Power Act recognizes, the District Court properly entertained the suit under the jurisdictional provisions of the Act, reinforcing, as they do, the general jurisdictional provisions governing the district courts. See Act of March 3, 1911, § 24 First, Eighth, 36 Stat. 1091, 1092, 28 U. S. C. §§ 1331, 1337.

Appendix C

The Federal Power Act directs that

> "All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful." § 205 (a), 49 Stat. 851, 16 U. S. C. § 824d (a).

We face at the outset the contention that this section confers on the Federal Power Commission authority to award reparations for unreasonable rates collected in the past. Federal railroad rate legislation gave such a power to the Interstate Commerce Commission. Act of Feb. 4, 1887, §§ 9, 16, 24 Stat. 382, 384-385, as amended, 49 U. S. C. §§ 9, 16 (1); cf. Act of Aug. 15, 1921, § 308, 42 Stat. 165, 7 U. S. C. § 209. But it was not given to the Federal Power Commission. It was withheld deliberately. See S. Rep. No. 621, 74th Cong., 1st Sess. 20. Wholesale consumers of electric energy were apparently considered, as a rule, adequately protected by the provisions of the Act authorizing the Commission to grant prospective relief and, in certain circumstances, to order refunding of sums accumulated during the pendency of rate proceedings. §§ 205 (e), 206 (a), 49 Stat. 852, 16 U. S. C. §§ 824d (e), 824e (a). Despite the unqualified statutory declaration that unreasonable rates are unlawful, we think it clear that Congress did not intend either court or Commission to have the power to award reparations on the ground that a properly filed rate or charge has in fact been unreasonably high or low. If that were

all the complaint before us showed, we would agree that recovery of damages in a civil action would not be an appropriate remedy, and that the complaint should have been dismissed.

But the case before us is very different. Montana-Dakota does not assert merely that the rates fixed and filed for it by the defendant were unreasonable. Montana-Dakota claimed and introduced evidence to show that some contracts required by the Act to be filed were not filed at all; that others were filed months late; and that some were not the bona fide contracts obtained by arm's length negotiation that on their face they appeared to be, but instead were "conceived and put into operation by the defendant and its aforesaid directors and officers for the purpose of exacting large charges from [Montana-Dakota] for the purpose, among other things, of offsetting charges of [Montana-Dakota] for electrical energy generated in North Dakota and transmitted to and sold to defendant for resale in South Dakota." See cause 3, ¶ V of the complaint. Thus the complaint in substance alleges that Northwestern misled the Commission into approving schedules which would not have been approved had Northwestern complied with the obligations of full and fair disclosure imposed on it by the Federal Power Act. While the complaint does not artistically allege that domination by Northwestern prevented Montana-Dakota from complaining to the Commission that the rates and charges were unreasonable, that is its plain import and the facts were so found at the trial.

We are not here concerned with the complaint insofar as it sets forth a common-law cause of action based on misuse of powers by the directors of a controlled corpora-

tion. Such an action by itself of course cannot be brought in a federal court in the absence of diversity of citizenship between the parties. But this does not preclude the same circumstances from giving rise to a cause of action that has its roots in the Federal Power Act. As such the controversy does fall within the jurisdiction of a federal court. The essence of this cause of action is that the Federal Power Act imposed on Northwestern the duty to charge and pay reasonable rates in its transactions with Montana-Dakota; and that, while under the Act rates appropriately filed are, when unchallenged, the legal rates and deemed to be reasonable, in the circumstances here alleged the schedules and contracts filed were not complete or timely or bona fide. Since it was coercively controlled, Montana-Dakota could neither file rates that were truly reasonable nor protest unreasonable rates filed on its behalf.

The Court of Appeals apparently closed the door of the District Court to this suit on the assumption that relief could be had from the Federal Power Commission for the damage flowing from violation of the Federal Power Act. Of course a court would not grant relief, at least in the first instance, if an adequate administrative remedy were available. It is fundamental to federal regulatory legislation that "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50-51. This principle is particularly relevant to rate regulation. *Texas & Pac. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Mitchell Coal Co.* v. *Pennsylvania R. Co.*, 230 U. S. 247; *Armour & Co.* v. *Alton R. Co.*, 312 U. S. 195. Compare *Great Northern R. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285.

But we do not find that the Federal Power Act provides administrative remedies to meet the situation before us. We have seen that that Act does not authorize the Commission to award reparations to those subjected to unreasonable rates. The Act likewise does not afford to the Commission the authority conferred on administrative agencies under other regulatory statutes to award damages to those injured by violations of the Act. Compare Act of February 4, 1887, § 9, 24 Stat. 382, 49 U. S. C. § 9; Act of August 15, 1921, § 309 (e), 42 Stat. 166, 7 U. S. C. § 210 (e). The Power Act, it is true, does give the Commission authority to look into past rates in order to determine whether the Act has been violated. § 307 (a), 49 Stat. 856, 16 U. S. C. § 825f (a). See *Atlantic Coast Line R. Co.* v. *Florida*, 295 U. S. 301, 312. But such an inquiry cannot be made the basis for an administrative award of damages to the victims of the violations. Again, the Commission may, as the Government suggests, have power under the omnibus provisions of § 309 to vacate its approval of a rate when approval has been obtained by fraud. 49 State. 858, 16 U. S. C. § 825h. But this does not authorize the Commission to fix rate orders retrospectively. The Commission may establish rates only "to be thereafter observed and in force." § 206 (a), 49 Stat. 852, 16 U. S. C. § 824e (a).

If the Commission can neither fix rates retrospectively nor award damages, it clearly can afford no adequate remedy to Montana-Dakota. Vacating its acquiescence in the interlocking directorate or in the schedules filed by Northwestern might prevent Northwestern from asserting the approval of the federal agency in an action brought against it under State law; but it would not provide a basis for recovery by the injured party or im-

pose any certain liability on the wrongdoer. We are bound to conclude that the Court of Appeals was in error in thinking that an adequate administrative remedy existed and precluded courts from granting relief.

But we cannot agree that the inability of the Federal Power Commission to grant relief requires that courts be similarly disabled. Courts, unlike administrative agencies, are organs with historic antecedents which bring with them well-defined powers. They do not require explicit statutory authorization for familiar remedies to enforce statutory obligations. *Texas & N. O. R. Co.* v. *Brotherhood of Clerks*, 281 U. S. 548; *Virginia R. Co.* v. *System Federation*, 300 U. S. 515; *Deckert* v. *Independence Shares Corp.*, 311 U. S. 282. A duty declared by Congress does not evaporate for want of a formulated sanction. When Congress has "left the matter at large for judicial determination," our function is to decide what remedies are appropriate in the light of the statutory language and purpose and of the traditional modes by which courts compel performance of legal obligations. See *Board of Comm'rs* v. *United States*, 308 U. S. 343, 351. If civil liability is appropriate to effectuate the purposes of a statute, courts are not denied this traditional remedy because it is not specifically authorized. *Texas & Pac. R. Co.* v. *Rigsby*, 241 U. S. 33; *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192; *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U. S. 210; cf. *De Lima* v. *Bidwell*, 182 U. S. 1.

That civil liability is an appropriate remedy in the situation before us is attested alike by the words of the statute, by the force of familiar principles of liability, and by practical considerations in carrying out legislative objectives.

Appendix C

The Power Act is explicit that any "rate or charge that is not just and reasonable is hereby declared to be unlawful." § 205 (a), 49 Stat. 851, 16 U. S. C. § 824d (a). The aim of Congress would be needlessly aborted if this "definite statutory prohibition of conduct" did not impose civil liability in a situation not covered by administrative remedies merely because no judicial relief was explicitly authorized. Compare *Texas & N. O. R. Co.* v. *Brotherhood of Clerks, supra*, at 568. The right of civil recovery by persons compelled to pay unreasonable or discriminatory rates to common carriers is one of the oldest forms of relief in our law. *Western Union Tel. Co.* v. *Call Publishing Co.*, 181 U. S. 92. To enforce a remedy for collection of unreasonable charges in the situation before us, therefore, would recognize deeply-rooted law; to deny it would be inconsistent with long-established judicial practice. The experience of the Commission indicates that the statute itself, by virtue of the positive duties it commands, under normal circumstances is very largely its own sanction.[1] Want of explicitness in providing a familiar remedy for the rare case of disobedience should not be construed a denial of it.

To leave relief to the diverse and conflicting State law dealing with intercorporate relations would make for conflicting local administration of an important national problem. This Court has recently shown marked reluc-

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[1] Data supplied by the Commission show that rate reductions proposed by utilities invariably become effective as filed. More than half of the rate increases likewise become effective automatically as filed. Those which are suspended by the Commission are as a general rule withdrawn, modified, or approved after informal conferences between the parties and the Commission's staff.

tance to leave to the States determination of even State law questions involved in the administration of the Federal Power Act. *First Iowa Cooperative v. Federal Power Commission*, 328 U. S. 152. What is involved here—the frustration, by misuse of the machinery of the Federal Power Act, of the command of Congress that rates be reasonable—has a federal character and significance. We do not think it likely that Congress intended that there should be no relief for this kind of tampering with the federal regulatory scheme other than that which might be afforded by the corporation law of the forty-eight States.

We could attribute such a purpose to Congress only if to allow civil relief in the situation before us would interfere with the administrative remedies contemplated under the Act, or impose on courts alien responsibilities or duties they are not equipped to fulfill. No such consequence is remotely involved in utilizing this age-old remedy. The statute is based on the assumption that unlawful rates will ordinarily be promptly corrected at the initiative of injured parties permitted to resort to the Commission for prospective relief. § 306, 49 Stat. 856, 16 U. S. C. § 825e. That procedure is not available when the wrong asserted is that the defendant corporation has established unlawful schedule by fraudulent domination of the utility with which it transacts business. To grant judicial relief for such a wrong will not interfere with the remedial procedure to which the Act confines corporations which are their own masters.

Nor will it transfer to the courts responsibility for deciding questions which should properly be presented to the Power Commission. In a variety of situations we have

recently emphasized the principle that courts and agencies "are to be deemed collaborative instrumentalities of justice." *United States* v. *Morgan*, 313 U. S. 409, 422, 307 U. S. 183; *Palmer* v. *Massachusetts*, 308 U. S. 79. To that end it is established practice that courts may entertain actions brought before them, but call to their aid the appropriate administrative agency on questions within its administrative competence. See *Smith* v. *Hoboken R. Co.*, 328 U. S. 123; *Thompson* v. *Texas Mexican R. Co.*, 328 U. S. 134; cf. *United States Alkali Assn.* v. *United States*, 325 U. S. 196, 210. In the *El Dorado Oil Works* litigation we held that proper procedure required the District Court to entertain a suit on a contract but to look to the Interstate Commerce Commission for guidance as to transportation practices involved in carrying out the contract. *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422, 433; *El Dorado Oil Works* v. *United States*, 328 U. S. 12. The fact that the Federal Power Commission is not itself authorized to award damages does not disable it from advising a court on questions on which its judgment is needed. See *United States* v. *Morgan*, *supra*; *Atlantic Coast Line R. Co.* v. *Florida*, *supra*, at 312. We see no reason why the Commission's findings should not be sought here.

We think, therefore, that a cause of action within the jurisdiction of the district courts is stated by a complaint charging a distributor of electric energy at wholesale in interstate commerce (1) with buying or selling at unreasonable rates, (2) with failure to comply with procedural requirements of the Federal Power Act, and (3) with preventing others from resorting to the remedies afforded by that Act. In such cases the district court should stay proceedings and request determination by the

Federal Power Commission of matters within the Commission's special competence. It is within the Commission's domain to rule whether filed rates should not, in view of all relevant circumstances, be considered "reasonable" rates. It also falls to the Commission to decide what would have been the reasonable rates. The opinion of the Commission, being "only a preliminary, interim step" towards final judgment, would not be a reviewable order under § 313 (b) of the Act, but would be reviewed only as a part of the judgment entered by the district court. *Federal Power Comm'n* v. *Hope Natural Gas Co.*, 320 U. S. 591, 618, 619.

The objections raised to this procedure have apparently not been considered substantial by the Federal Power Commission, the body primarily charged with administration of the Act.[2] We do not think they should prevail. The function of the District Court is not simply to serve as a facade behind which the Commission is enabled to accomplish indirectly what it cannot do directly. Certain issues of fact—the completeness of disclosure, for instance, or the loyalties of the directors—are properly for the court. Action by the court may similarly be required in determining the appropriate disposition of the fund. See *Federal Power Comm'n* v. *Interstate National Gas Co.*, 336 U. S. 577, 181 F. 2d 833. Recovery by Montana-Dakota need not be a windfall to that company. Many changes in costs charged utilities are not reflected in prices they may collect. Compare *St. Louis & O'Fallon R. Co.* v. *United States*, 279 U. S. 461, 488, 505-509 (Mr. Justice Brandeis, dissenting). To

[2] In its brief here the Commission urged adoption of substantially the ground set forth in this opinion.

the extent that Montana-Dakota has passed on its loss to its customers, they may be permitted recovery from it on well-established principles of unjust enrichment. And even if the effect of awarding relief is ultimately to benefit Montana-Dakota, it certainly has a better claim to the exacted funds than Northwestern. The procedure here outlined is not unlike that which the Court employed in *United States* v. *Morgan, supra*, where a similar demand was made on the resourcefulness of law to find a remedy to meet an unusual situation. Such a remedy not only defeats unjust enrichment as between private parties. This is accomplished in the public interest of effectuating the Federal Power Act.

Because we conclude that the District Court, while correct in refusing to dismiss the complaint, should have asked the Federal Power Commission to determine matters peculiarly within its competence and report its finding to that court, we think the case should be remanded to that court for further proceedings not inconsistent with this opinion. We do not, of course, intimate any opinion as to the sufficiency of the evidence to support the conclusion that the filed rates in this case should not be deemed lawful. Nor would we restrict any appropriate use the Commission might wish to make of evidence adduced at the trial.

Appendix C.

DECISION IN TEXAS AND PACIFIC RAILWAY COMPANY *v.* ABILENE COTTON OIL COMPANY—204 U. S. 426 (Texas)

TEXAS AND PACIFIC RAILWAY COMPANY

v.

ABILENE COTTON OIL COMPANY

ERROR TO THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

No. 78. Argued November 2, 1906.—Decided February 25, 1907.

Where defendant in the state court contends that, consistently with the Interstate Commerce Act, the state court has no power to grant the relief, and such contention is essentially involved and expressly, and, in order to support the judgment, necessarily, decided adversely to the defendant, a Federal question exists and this court can review the judgment on writ of error under § 709, Rev. Stat.

Where the state court determined a case involving railroad rates on the hypothesis conceded by counsel on both sides that the rate was one of a lawful schedule duly filed and published in accordance with the Interstate Commerce Act, the contention that the rate was

not so filed and published and, therefore, was not a legal rate is not open in this court.

While repeals by implication are not favored and a statute will not be construed as abrogating an existing common-law remedy, it will be so construed if such preexisting right is so repugnant to it as to deprive it of its efficacy and render its provisions nugatory.

The Interstate Commerce Act was intended to afford an effective and comprehensive means for redressing wrongs resulting from unjust discriminations and undue preference, and to that end placed upon carriers the duty of publishing schedules of reasonable and uniform rates; and consistently with the provisions of that law, a shipper cannot maintain an action at common law in a state court for excessive and unreasonable freight rates exacted on interstate shipments where the rates charged were those which had been duly fixed by the carrier according to the act and had not been found to be unreasonable by the Interstate Commerce Commission.

85 S. W. Rep. 1052, reversed.

The facts are stated in the opinion.

Mr. David D. Duncan, with whom *Mr. John F. Dillon*, *Mr. Winslow S. Pierce* and *Mr. Thomas J. Freeman* were on the brief, for plaintiff in error:

If an act of Congress gives a right to a party aggrieved without specifying a remedy, it might be enforced in a state court; but, if a right is conferred by statute and a specific remedy provided, or a new power and means of execution granted, the right can be enforced only in the mode provided in the act.

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A party who seeks damages alleged to have been sustained in consequence of a violation by a common carrier of the Interstate Commerce Law, as the act provides for redress by a procedure either before the Commission or by suit in a Federal court, cannot bring suit before a state court, which is without jurisdiction to enforce the right, but is relegated exclusively to the Commission or Federal court; otherwise, the party would have a third alternative or mode of redress not contemplated by the act. He is restricted to one of two remedies.

Where a right arises under the laws of the United States, Congress may, if it sees fit, give to the Federal courts exclusive jurisdiction.

When a right is given by statute, and a specific remedy provided, or new power, and also means of execution, the power can be executed, and the right vindicated, in no other way than that prescribed by the act.

The Interstate Commerce Act providing that remedies thereunder must be sought in the Federal courts or before the Interstate Commerce Commission, but not in both, by necessary implication excludes the idea of jurisdiction in any other tribunals. The act confers the right and provides the remedy and means of enforcement. Interstate Commerce Act, February 4, 1887, and Amendment 1, Supp., Rev. Stat., p. 529, especially §§ 8, 9; *Frank T. Copp* v. *L. & N. R. R. Co.*, 43 Louisiana, 511, 514; *G., C. & S. F.* v. *Moore*, 83 S. W. Rep. 362; *Van Patten* v. *Chicago, M. & St. P.*, 74 Fed. Rep. 981; *Ex parte McNeil*, 13 Wall. 236; *Gilman* v. *Philadelphia*, 3 Wall. 713; *Swift* v. *Philadelphia R. R. Co.*, 58 Fed. Rep. 858; *Claflin* v. *Houseman*, 93 U. S. 130 (see p. 137); *The Moses Taylor*, 4 Wall. 411, 425, 431; Story on the Const., §§ 436-447.

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The only lawful rate that can be charged and collected by a common carrier upon an interstate shipment is the legally filed, published and posted rate under the act to regulate commerce, and no cause of action for damages or otherwise will lie against a carrier for collecting its duly-published, filed and posted rates. If this rate be unreasonable, the only remedies the shipper has are those provided in § 9 of the Interstate Commerce Act. By the terms of that act, it is illegal for either a corporation or person to give or receive any rebate, concession, etc., and declaring same to be unlawful; and the person or corporation so doing to be guilty of a misdemeanor. By §§ 6, 10 of the original act, and by the Elkins amendment of February 19, 1903, it is provided that it shall be a misdemeanor and unlawful, punishable by a fine, for any person, persons or corporations to grant, give or solicit, accept or receive, any rebate or concession in respect to the transportation of property in interstate or foreign commerce, whereby any such property shall, by any device whatever, be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereof. *Texas v. Pacific Ry. Co.* v. *Mugg & Dryden*, 202 U. S. 242; *Heflay* v. *Railway Co.*, 158 U. S. 98; *Southern Ry.* v. *Harrison*, 119 Alabama, 539; *M., K. & T. Ry. Co.* v. *Trinity Lumber Co.*, 1 Tex. Civ. App. 553; *Texas & Pacific Ry. Co.* v. *Clark*, 4 Tex. Civ. App. 611; *M., K. & T. Ry. Co.* v. *Stoner*, 5 Tex. Civ. App. 50; *Dillingham* v. *Fischel*, 1 Tex. Civ. App. 546; *S. A. & P. Ry. Co.* v. *Clements*, 20 Tex. Civ. App. 498; Acts of Congress of February 4, 1887, 1 Supp. U. S. Stats. 529, and amendments thereto, especially §§ 6, 10.

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Mr. Hannis Taylor for defendant in error:

The highest court of a State may administer the common law according to its own understanding and interpretation, without liability to a review in the Federal Supreme Court, unless some right, title, immunity or privilege, the creation of the Federal power, has been asserted or denied. *Penna. R. R. Co.* v. *Hughes*, 191 U. S. 477, and cases there cited.

This common law right, as thus administered, was not taken away by the Interstate Commerce Act (approved February 4, 1887) either directly or by necessary implication. Statutes in derogation of the common law are to be strictly construed and are not presumed to make any alteration in the common law further or otherwise than the clear import of the statutory language necessarily requires. 26 Am. & Eng. Ency. of Law, (2d ed.) 662, and authorities cited, including *Brown* v. *Barry*, 3 Dall. 365; *Wilson* v. *Lenox*, 1 Cranch, 211; *McCool* v. *Smith*, 1 Black, 459; *Shaw* v. *Railroad Co.*, 101 U. S. 557. Affirmative words without negative words do not annul the common law. Unless the intent of a statute is manifest, the constructive repeal of the common law, by implication, cannot be inferred. *Jennings* v. *Commonwealth*, 17 Pick. 82; *State* v. *Norton*, 23 N. J. L. 39. When a statute merely provides a new remedy for a preexisting right, the new remedy is merely cumulative. 26 Am. & Eng. Ency. of Law, (2d ed. 614, 671, and cases cited.

The interpretation clause of the Interstate Commerce Act specially provides that "nothing in this act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this

act are in addition to such remedies." A statutory declaration contained in the body of an act, declaring the meaning thereof as well as the intent of the legislature in enacting it, is mandatory and controlling on the courts. *Farmers Bank* v. *Hale*, 59 N. Y. 53; *Commonwealth* v. *Curry*, 4 Pa. Super. Ct. 356; *Snyder* v. *Compton*, 87 Texas, 374; *Rossmiller* v. *State*, 114 Wisconsin, 169.

No right, title, privilege or immunity under a Federal statute specially pleaded and set up in the state court was denied by that court. *Kizer* v. *Texarkana & Ft. Smith Ry. Co.*, 179 U. S. 199. Even if the state court could not try questions involving the construction of the Interstate Commerce Act, yet this suit being brought on the common law liability of plaintiff in error, jurisdiction to hear and determine the facts pleaded by defendant in error could not be defeated by facts outside of the allegations unless a plea had been interposed to the jurisdiction; such plea showing want of jurisdiction in the trial court, and further showing a court with jurisdiction.

Mr. Justice White delivered the opinion of the court.

The oil company, the defendant in error, sued to recover $1,951.83. It was alleged that on shipments of carloads of cotton seed made in September and October, 1901, over the line of the defendant's road from various points in Louisiana east of Alexandria, in that State, to Abilene, Texas, the carrier had exacted, over the protest of the oil company, on the delivery of the cotton seed, the payment of an unjust and unreasonable rate, which exceeded in the aggregate, by the sum sued for, a just and reasonable charge. There were, moreover, averments that the rate exacted was discriminatory, constituted an undue pref-

erence, and amounted to charging more for a shorter than for a longer haul. Besides a general traverse, the railway company defended on the ground that the shipments were interstate, and were, therefore, covered by the act of Congress to regulate commerce. It was averred that as the rate complained of was the one fixed in the rate sheets which the company had established, filed, published and posted, as required by that act, the state court was without jurisdiction to entertain the cause, and even if such court had jurisdiction, it could not, without disregarding the act to regulate commerce, grant relief upon the basis that the established rate was unreasonable, when it had not been found to be so by the Interstate Commerce Commission.

The trial court made findings of fact. Those relating to the subject of the establishing, filing and publishing by the railway company of rate sheets containing the rate which was complained of were as follows:

"7th. That the Western Classification Committee, agent and representative of numerous railways and of defendant, filed with the Interstate Commerce Commission what is known as the Western Classification, giving classifications of different articles or items of merchandise, and in same cotton seed is classed as 'A;' that this was the joint act of a number of roads, and the defendant adopted said joint classification; that on May 30, 1901, the Southwestern Freight Committee, agent of a number of roads and agent of defendant, filed with the said commission a supplement for numerous roads in connection with defendant, whereby the rate on cotton seed from all points in Louisiana east of Alexandria was fixed at 67 cents per 100 pounds to all points in Texas from all points in Louisiana east of Alexandria and west of Alexandria;

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"8th. That said classification and said rate schedule was adopted by defendant and was filed by said S. W. Freight Committee with said Interstate Commerce Commission in behalf of defendant.

"9th. That copies of said schedule and said tariffs and classifications were kept in the office of said defendant at said points of shipment and at said Abilene, that is, in the freight office and depots, for the inspection of the public, as admitted by plaintiff, which admission is found in the statement of facts.

"10th. That other than said schedule and classification nothing has been filed with the Interstate Commerce Commission by or in behalf of defendant in the way of classifications, schedules or rates on cotton seed from points on its road in Louisiana to points on its road in Texas."

From the facts found the court stated the following as its conclusions:

"1st. The facts so found show that this was an interstate shipment.

"2d. The facts so found show that the defendant complied with the interstate commerce law, and said rates and classifications were thereby properly established and in force, except that the rate charged on cotton seed in carload lots was unreasonable and excessive.

"3d. I find that the rate charged by the defendant was not established under the interstate commerce law."

As nothing in these conclusions relates to the averments of discrimination, undue preference, or a greater charge for a shorter than for a longer haul, those subjects, it may be assumed, were considered to have been eliminated in the course of the trial.

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There was judgment for the railway company. When the controversy came to be disposed of by the Court of Civil Appeals, to which the cause was taken, that court deemed there was only one question presented for decision; that is, whether, consistently with the act to regulate commerce, there was power in the court to grant relief upon the finding that the rate charged for an interstate shipment was unreasonable, although such rate was the one fixed by the duly published and filed rate sheet, and when the rate had not been found to be unreasonable by the Interstate Commerce Commission. In opening its opinion the court said (85 S. W. Rep. 1052):

"Adopting the construction of the pleadings evidently given them in the briefs, and treating it as presented, the case, briefly stated, is an action by appellant for damages for a violation of an alleged common law right, in that appellee demanded and coercively collected from appellant freight charges in excess of a reasonable compensation, for the transportation of a number of carloads of cotton seed from the town of Cotton Port and other designated towns in the State of Louisiana to the city of Abilene in the State of Texas."

After referring to the findings as to the unreasonableness of the charge exacted, and after pointing out that the railway company had not, by a cross assignment, challenged the correctness of the findings of the trial court as to the unreasonableness of the rate, it was said:

"So that we are relieved from a consideration of the difficulties discussed in some of the cases in ascertaining the fact, and therefore now have squarely before us the questions whether in a state court a shipper in cases of interstate carriage can, by the principles of the com-

mon law, be accorded relief from unjust and unreasonable freight rates exacted from him, or shall relief in such cases be denied merely because such unreasonable rate has been filed and promulgated by the carrier under the Interstate Commerce Act?"

Proceeding in an elaborate opinion to dispose of the question thus stated to be the only one for consideration, the conclusion was reached that jurisdiction to grant relief existed, and that to do so was not repugnant to the act to regulate commerce. Applying these conclusions to the findings of fact, the relief prayed was allowed. The court said:

"We therefore adopt the trial court's findings of fact, and, applying thereto the principles of law we have deduced, reverse the judgment, and here render judgment in appellant's favor for the said sum of $1,951.83, excessive freights charged, with interest. . . ."

The assigned errors are addressed exclusively to the operation of the act to regulate commerce upon the jurisdiction of the court below to entertain the controversy, and its power in any event to afford relief to the oil company, based upon the alleged unreasonableness of the rate under the circumstances disclosed. Before we take up the consideration of that subject, however, two questions must be disposed of: First, it is insisted that this court is without jurisdiction, because no Federal question is presented. We think it suffices to say that it obviously results from the statements previously made that a question of that character was presented by the pleadings, was passed upon by the trial court, was expressly and necessarily decided by the court below and is also essentially involved in the cause at it is before us. Second,

it is urged that the effect of the act to regulate commerce upon the right of the oil company to recover need not be passed upon, since, even if error on that subject was committed below, a review of the decision in that regard is unnecessary, because if the correct legal inference be drawn from the facts found by the trial court, which were adopted by the appellate court, it will result that the railway company had not established a legal schedule of rates in compliance with the act to regulate commerce, and therefore the jurisdiction of the court and its right to afford relief was not at all affected by the provisions of the act. We do not presently stop to consider whether the consequences as to jurisdiction and right to recover which are asserted would result if the premise was well founded, because we think the premise is either shown by the findings to the unfounded or it is not open for contention on the record. The premise rests upon two propositions of fact: *a*. That the findings of the trial court show that the rate sheet filed was joint and therefore did not necessarily relate to a shipment entirely over the road of the railway company. This contention, we think, is shown by the findings to be without merit, since those findings clearly point out that the rate sheet was filed by an agent of the defendant railroad, was by it adopted, and constituted the only rate sheet embracing the traffic in question. *b*. Although it is conceded that the evidence showed that the schedule of rates was established and filed with the Interstate Commerce Commission and was kept at the stations of the railway company for public inspection, and that the oil company had knowledge of the fact, it is insisted that the facts found do not justify the conclusion that there was a compliance with the requirements of the act to regulate

commerce as to the posting of the established schedule. We think this contention is not open on this record. As we have seen, the trial court expressly concluded that the railway company had complied with the act to regulate commerce in the matter of filing, etc., its schedule of rates, and the appellate court opened its opinion by the statement that the course of the trial and the briefs of counsel confined the issue for determination to the question of the effect of the act to regulate commerce upon the rights of the parties, manifestly upon the assumption that the correctness of the conclusion of the trial court as to compliance with the act was conceded by both parties. In other words, as the court below in deciding the case expressly declared that the course of the argument and briefs of counsel before it had confined the case to the issue of whether there was a right to recover upon the hypothesis that a schedule of rates had been filed and published, we do not think that it is now open to contend that that which the court below in effect declared was conceded in the briefs of counsel to be a lawful schedule of rates was not such. *Non constat,* that if the Court of Civil Appeals, having the evidence before it, had not treated the case as presented, it might not have considered the facts in relation to the publication of the schedule and affirmatively found facts inevitably compelling the conclusion that the act to regulate commerce had been fully complied with, even if such inference was not sufficiently sustained by the findings of the trail court which the appellate court adopted. Because we thus find the question not open for consideration we must not be considered as conceding the correctness of the conclusion attempted to be drawn from the supposed failure to post.

We are thus brought to the underlying proposition in the case, viz., the effect of the act to regulate commerce

upon the claim asserted by the oil company. As presented below and pressed at bar, the question takes a seemingly two-fold aspect, the jurisdiction of the court below as affected by the act to regulate commerce and the right to the relief sought consistently with that act, even if jurisdiction existed. We say that these questions are only seemingly different, because they present but different phases of the fundamental question, which is the scope and effect of the act to regulate commerce upon the right of a shipper to maintain an action at law against a common carrier to recover damages because of the exaction of an alleged unreasonable rate, although the rate collected and complained of was the rate stated in the schedule filed with the Interstate Commerce Commission and published according to the requirements of the act to regulate commerce, and which it was the duty of the carrier under the law to enforce as against shippers. We come, therefore, first, to the consideration of that subject.

Without going into detail, it may not be doubted that at common law, where a carrier refused to receive goods offered for carriage except upon the payment of an unreasonable sum, the shipper had a right of action in damages. It is also beyond controversy that when a carrier accepted goods without payment of the cost of carriage or an agreement as to the price to be paid, and made an unreasonable exaction as a condition of the delivery of the goods, an action could be maintained to recover the excess over a reasonable charge. And it may further be conceded that it is now settled that even where, on the receipt of goods by a carrier, an exorbitant charge is stated, and the same is coercively exacted either in advance or at the completion of the service,

an action may be maintained to recover the overcharge. 2 Kent. Comm., 599, and note *a;* 2. Smith Lead. Cas., pt. 1, 8th ed., Hare & Wallace notes, p. 457.

As the right to recover, which the court below sustained, was clearly within the principles just stated, and as it is conceded that the act to regulate commerce did not in so many words abrogate such right, it follows that the contention that the right was taken away by the act to regulate commerce rests upon the proposition that such result was accomplished by implication. In testing the correctness of this proposition we concede that we must be guided by the principle that repeals by implication are not favored, and indeed that a statute will not be construed as taking away a common law right existing at the date of its enactment, unless that result is imperatively required; that is to say, unless it be found that the preexisting right is so repugnant to the statute that the survival of such right would in effect, deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory.

Both parties concede that the question for decision has not been directly passed upon by this court, and that its determination is only persuasively influenced by adjudications of other courts. They both hence mainly rely upon the text of the act to regulate commerce as it existed at the time the shipments in question were made. The case, therefore, must rest upon an interpretation of the text of the act and is measurably one of first impression.

Let us, without going into detail, give an outline of the general scope of that act with the object of fixing the rights which it was intended to conserve or create, the

wrongs which it proposed to redress and the remedies which the act established to accomplish the purposes which the lawmakers had in view.

The act made it the duty of carriers subject to its provisions to charge only just and reasonable rates. To that end the duty was imposed of establishing and publishing schedules of such rates. It forbade all unjust preferences and discriminations, made it unlawful to depart from the rates in the established schedules until the same were changed as authorized by the act, and such departure was made an offense punishable by fine or imprisonment, or both, and the prohibitions of the act and the punishments which it imposed were directed not only against carriers but against shippers, or any person who, directly or indirectly, by any machination or device in any manner whatsoever, accomplished the result of producing the wrongful discriminations or preferences which the act forbade. It was made the duty of carriers subject to the act to file with the Interstate Commerce Commission created by that act copies of established schedules, and power was conferred upon that body to provide as to the form of the schedules, and penalties were imposed for not establishing and filing the required schedules. The Commission was endowed with plenary administrative power to supervise the conduct of carriers, to investigate their affairs, their accounts and their methods of dealing, and generally to enforce the provisions of the act. To that end it was made the duty of the District Attorneys of the United States, under the direction of the Attorney General to prosecute proceedings commenced by the Commission to enforce compliance with the act. The act specially provided that whenever any common carrier subject to its provisions "shall do, cause to be

done, or permit to be done any act, matter or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act. . . ." Power was conferred upon the Commission to hear complaints concerning violations of the act, to investigate the same, and, if the complaints were well founded, to direct not only the making of reparation to the injured persons, but to order the carrier to desist from such violation in the future. In the event of the failure of a carrier to obey the order of the Commission that body, or the party in whose favor an award of reparation was made, was empowered to compel compliance by invoking the authority of the courts of the United States in the manner pointed out in the statute, *prima facie* effect in such courts being given to the findings of fact made by the Commission. By the ninth section of the act it was provided as follows:

"That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the Commission, as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any District or Circuit Court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. . . ."

And by section 22, which we shall hereafter fully consider, existing appropriate common law and statutory remedies were saved.

When the act to regulate commerce was enacted there was contrariety of opinion whether, when a rate charged by a carrier was in and of itself reasonable, the person from whom such a charge was exacted had at common law an action against the carrier because of damage asserted to have been suffered by a discrimination against such person or a preference given by the carrier to another. *Parsons* v. *Chicago & Northwestern Ry.*, 167 U. S. 447, 455; *Interstate Commerce Commission* v. *Baltimore & Ohio R. R.*, 145 U. S. 263, 275. That the act to regulate commerce was intended to afford an effective means for redressing the wrongs resulting from unjust discrimination and undue preference is undoubted. Indeed, it is not open to controversy that to provide for these subjects was among the principal purposes of the act. *Interstate Commerce Commission* v. *Cincinnati, New Orleans & Texas Pacific Ry. Co.*, 167 U. S. 479, 494. And it is aparent that the means by which these great purposes were to be accomplished was the placing upon all carriers the positive duty to establish schedules of reasonable rates which should have a uniform application to all and which should not be departed from so long as the established schedule remained unaltered in the manner provided by law. *Cincinnati, New Orleans & Texas Pacific Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 184; *Interstate Commerce Commission* v. *Cincinnati, New Orleans & Texas Pacific Ry. Co.*, 167 U. S. 479.

When the general scope of the act is enlightened by the considerations just stated it becomes manifest that there

is not only a relation, but an indissoluble unity between the provision for the establishment and maintenance of rates until corrected in accordance with the statute and the prohibitions against preferences and discrimination. This follows, because unless the requirement of a uniform standard of rates be complied with it would result that violations of the statute as to preferences and discrimination would inevitably follow. This is clearly so, for if it be that the standard of rates fixed in the mode provided by the statute could be treated on the complaint of a shipper by a court and jury as unreasonable, without reference to prior action by the Commission, finding the established rate to be unreasonable and ordering the carrier to desist in the future from violating the act, it would come to pass that a shipper might obtain relief upon the basis that the established rate was unreasonable, in the opinion of a court and jury, and thus such shipper would receive a preference or discrimination not enjoyed by those against whom the schedule of rates was continued to be enforced. This can only be met by the suggestion that the judgment of a court, when based upon a complaint made by a shipper without previous action by the Commission would give rise to a change of the schedule rate and thus cause the new rate resulting from the action of the court to be applicable in future as to all. This suggestion, however, is manifestly without merit, and only serves to illustrate the absolute destruction of the act and the remedial provisions which it created which would arise from a recognition of the right asserted. For if, without previous action by the Commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that unless all courts reached an identical conclusion

a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question. Indeed the recognition of such a right is wholly inconsistent with the administrative power conferred upon the Commission and with the duty, which the statute casts upon that body, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed. Equally obvious is it that the existence of such a power in the courts, independent of prior action by the Commission, would lead to favoritism, to the enforcement of one rate in one jurisdiction and a different one in another, would destroy the prohibitions against preferences and discrimination, and afford, moreover, a ready means by which, through collusive proceedings, the wrongs which the statute was intended to remedy could be successfully inflicted. Indeed no reason can be perceived for the enactment of the provisions endowing the administrative tribunal, which the act created, with power, on due proof, not only to award reparation to a particular shipper, but to command the carrier to desist from violation of the act in the future, thus compelling the alteration of the old or the filing of a new schedule, conformably to the action of the Commission, if the power was left in courts to grant relief on complaint of any shipper, upon the theory that the established rate could be disregarded and be treated as unreasonable, without reference to previous action by the Commission in the premises. This must be, because, if the power existed in both courts and the Commission to originally hear complaints on this subject, there might be a divergence between the action of the Commission and

the decision of the court. In other words, the established schedule might be found reasonable by the Commission in the first instance and unreasonable by a court acting originally, and thus a conflict would arise which would render the enforcement of the act impossible.

Nor is there merit in the contention that section 9 of the act compels to the conclusion that it was the purpose of Congress to confer power upon courts primarily to relieve from the duty of enforcing the established rate by finding that the same as to a particular person or corporation was so unreasonable as to justify an award of damages. True it is that the general terms of the section when taken alone might sanction such a conclusion, but when the provision of that section is read in connection with the context of the act and in the light of the considerations which we have enumerated we think the broad construction contended for is not admissible. And this becomes particularly cogent when it is observed that the power of the courts to award damages to those claiming to have been injured, as provided in the section, contemplates only a decree in favor of the individual complainant, redressing the particular wrong asserted to have been done, and does not embrace the power to direct the carrier to abstain in the future from similar violations of the act; in other words, to command a correction of the established schedules, which power, as we have shown, is conferred by the act upon the Commission in express terms. In other words, we think that it inevitably follows from the context of the act that the independent right of an individual originally to maintain actions in courts to obtain pecuniary redress for violations of the act conferred by the ninth section must be confined to redress of such wrongs as can, consistently

with the context of the act, be redressed by courts without previous action by the Commission, and, therefore, does not imply the power in a court to primarily hear complaints concerning wrongs of the character of the one here complained of. Although an established schedule of rates may have been altered by a carrier voluntarily or as the result of the enforcement of an order of the Commission to desist from violating the law, rendered in accordance with the provisions of the statute, it may not be doubted that the power of the Commission would nevertheless extend to hearing legal complaints of and awarding reparation to individuals for wrongs unlawfully suffered from the application of the unreasonable schedule during the period when such schedule was in force.

And the conclusion to which we are thus constrained by an original consideration of the text of the statute finds direct support, first, in adjudged cases in lower Federal courts and in the construction which the act has apparently received from the beginning in practical execution; and, second, is persuasively supported by decisions of this court which, whilst not dealing directly with the question here presented, yet necessarily concern the same.

1. In *Swift* v. *Philadelphia &c. Ry. Co.*, 64 Fed. Rep. 59, it was held that in an action at law to recover damages for the exaction of an alleged unreasonable freight charge, the rate established in conformity with the act to regulate commerce must be treated by the courts as binding upon the shipper, until regularly corrected in the mode provided by the statute. And in *Kinnavey* v. *Terminal R. R. Association*, 81 Fed. Rep. 802, in an able

opinion, the question was carefully considered and the same doctrine was announced and applied. When it is considered that the act to regulate commerce was enacted in 1887, and that neither the diligence of counsel nor our own researches have brought into view any case except the one now under consideration, holding that a court could, compatibly with the terms of that act, grant relief upon the basis that the established rate could be disregarded as unreasonable, it would seem to follow that the terms of the act had generally been treated in practical execution as incompatible with the existence of such power or right.

And this is greatly fortified when it is borne in mind that the reports of the decisions of the Interstate Commerce Commission show that many cases have been passed upon by that body concerning the unreasonableness of a rate fixed in an established schedule, which have resulted in awarding reparation to shippers and to the making of orders directing carriers to desist from future violation of the act; that is to say, in necessary legal effect correcting established schedules.

2. The cases of *Cincinnati, New Orleans & Texas Pacific Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 184; *Louisville & Nashville R. R. Co.* v. *Behlmer*, 175 U. S. 648, and *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 190 U. S. 273, involved the enforcement against carriers of orders of the Commission. After deciding that the orders of the Commission were not entitled to be enforced, because of errors of law committed by that body, this court declined to consider the question of the reasonableness *per se* of the rates as an original question; in other words, the correc-

tion of the established schedule without previous consideration of the subject by the Commission. It was pointed out that by the effect of the act to regulate commerce it was peculiarly within the province of the Commission to primarily consider and pass upon a controversy concerning the unreasonableness *per se* of the rates fixed in an established schedule. It was, therefore, declared to be the duty of the courts, where the Commission had not considered such a disputed question, to remand the case to the Commission to enable it to perform that duty, a conclusion wholly incompatible with the conception that courts, in independent proceedings, were empowered by the act to regulate commerce, equally with the Commission, primarily to determine the reasonableness of rates in force through an established schedule.

In *Gulf, Colorado &c. Ry.* v. *Hefley*, 158 U. S. 98, the facts were these: A rate had been fixed by a carrier in a bill of lading for an interstate shipment, which rate was less than that established under the provisions of the act to regulate commerce. On arrival of the goods at destination the carrier refused to deliver on tender of payment of the bill of lading rate, and demanded payment of and collected the higher established schedule rate. For so doing the carrier was proceeded against under a statute of the State of Texas, imposing a penalty upon a carrier for charging more than the rate fixed in a bill of lading. A judgment of the state court, enforcing the penalty, was reversed, upon the ground that the state statute, as applied, was repugnant to the act to regulate commerce, the court saying (p. 102):

"The carrier cannot obey one statute without sometimes exposing itself to the penalties prescribed by the other. Take the case before us. If, in disregard of the joint

tariff established by the defendant and the St. Louis and San Francisco Railway Company and filed with the Interstate Commerce Commission, the latter company, as a matter of favoritism, had issued this bill of lading at a rate less than the tariff rate, both the defendant company and its agent would, by delivering the goods upon the recipt of only such reduced rate, subject themselves to the penalties of the national law, while, on the other hand, if the tariff rate was insisted upon, then the corporation would become liable for the damages named in the state act. In case of such a conflict the state law must yield."

In *Texas & Pacific Ry. Co.* v. *Mugg*, 202 U. S. 242, the facts were as follows: On an interstate shipment a given rate, less than the lawful schedule rate, was quoted to the shipper by the agent of the railroad at the point of shipment: On the arrival of the goods at their destination the road exacted the schedule rate, whilst the shipper insisted he was entitled to the lower and quoted rate. And a recovery of the excess collected over the quoted rate was allowed by a court of the State of Texas. Reversing the judgment, it was here held that the rate fixed in the schedule filed pursuant to the act to regulate commerce was controlling, that it was beyond the power of the carrier to depart from such rates in favor of any shipper, and that the erroneous quotation of rates made by the agent of the railroad did not justify recovery, since to do so would be in effect enabling the shipper, whose duty it was to ascertain the published rate, to secure a preference over other shippers, contrary to the act to regulate commerce.

Appendix C

In view of the binding effect of the established rates upon both the carrier and the shipper, as expounded in the two decisions of this court just referred to, the contention now made if adopted would necessitate the holding that a cause of action in favor of a shipper arose from the failure of the carrier to make an agreement, when, if the agreement had been made, both the carrier and the shipper would have been guilty of a criminal offense and the agreement would have been so absolutely void as to be impossible of enforcement. Nor is there force in the suggestion that a like dilemma arises from the recognition of power in the Commission to award reparation in favor of an individual because of a finding by that body that a rate in an established schedule was unreasonable. As we have shown, there is a wide distinction between the two cases. When the Commission is called upon on the complaint of an individual to consider the reasonableness of an established rate, its power is invoked not merely to authorize a departure from such rate in favor of the complaint alone but to exert the authority conferred upon it by the act, if the complaint is found to be just, to compel the establishment of a new schedule of rates applicable to all. And like reasoning would be applicable to the granting of reparation to an individual after the establishment of a new schedule because of a wrong endured during the period when the unreasonable schedule was enforced by the carrier and before its change and the establishment of a new one. In other words, the difference between the two is that which on the one hand would arise from destroying the uniformity of rates which it was the object of the statute to secure and on the other from enforcing that equality which the statute commands.

But it is insisted that, however cogent may be the views previously stated, they should not control, because of the following provision contained in section 22 of the act to regulate commerce, viz: ". . . Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies." This clause, however, cannot in reason be construed as continuing in shippers a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself. The clause is concerned alone with rights recognized in or duties imposed by the act, and the manifest purpose of the provision in question was to make plain the intention that any specific remedy given by the act should be regarded as cumulative, when other appropriate common law or statutory remedies existed for the redress of the particular grievance or wrong dealt with in the act.

The proposition that if the statute be construed as depriving the courts generally, at the instance of shippers, of the power to grant redress upon the basis that an established rate was unreasonable without previous action by the Commission great harm will result, is only an argument of inconvenience which assails the wisdom of the legislation or its efficiency and affords no justification for so interpreting the statute as to destroy it. Even, however, if in any case we were at liberty to depart from the obvious and necessary intent of a statute upon considerations of expediency, we are admonished that the suggestions of expediency here advanced as not shown on this record to be justified. As we have seen, although the act to regulate commerce has been in force

for many years, it appears that by judicial exposition and in practical execution it has been interpreted and applied in accordance with the construction which we give it. That the result of such long-continued, uniform construction has not been considered as harmful to the public interests is persuasively demonstrated by the fact that the amendments which have been made to the act have not only not tended to repudiate such construction, but, on the contrary, have had the direct effect of strengthening and making, if possible, more imperative, the provisions of the act requiring the establishment of rates and the adhesion by both carriers and shippers to the rates as established until set aside in pursuance to the provisions of the act. Thus, by section 1 of the act approved February 19, 1903, commonly known as the Elkins act, which, although enacted since the shipments in question, is yet illustrative, the willful failure upon the part of any carrier to file and publish "the tariffs or rates and charges," as required by the act to regulate commerce and the acts amendatory thereof, "or strictly to observe such tariffs until changed according to law," was made a misdemeanor, and it was also made a misdemeanor to offer, grant, give, solicit, accept or receive any rebate from published rates or other concession or discrimination. And in the closing sentence of section 4 it was provided as follows:

"Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the act to regulate commerce or acts amendatory thereof, or participates in any rates so filed or published, that rate as against such carrier, its officers or agents in any prosecution begun under this act, shall be conclusively deemed to be the legal rate, and any de-

parture from such rate or any offer to depart therefrom shall be deemed to be an offense under this section of this act."

And, by section 3, power was conferred upon the Interstate Commerce Commission to invoke the equitable powers of a Circuit Court of the United States to enforce an observance of the published tariffs.

Concluding, as we do, that a shipper seeking reparation predicated upon the unreasonableness of the established rate must, under the act to regulate commerce, primarily invoke redress through the Interstate Commerce Comsion, which body alone is vested with power originally to entertain proceedings for the alteration of an established schedule, because the rates fixed therein are unreasonable, it is unnecessary for us to consider whether the court below would have had jurisdiction to afford relief if the right asserted had not been repugnant to the provisions of the act to regulate commerce. It follows, from what we have said, that the court below erred in the construction which it gave to the act to regulate commerce.

The judgment below is, therefore, reversed, and the case remanded for further proceedings not inconsistent with this opinion.